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IN

AMERICAN STATE TRIALS

A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.

WITH NOTES AND ANNOTATIONS

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TO
SIR EDMUND WALKER,
LL.D., D.C.L., C.V.O., ETC., ETC.

PRESIDENT OF CANADA'S GREAT FINANCIAL INSTITUTION; GOVERNING HEAD OF ITS SPLENDID UNIVERSITY; EMINENT WRITER ON MONEY AND BANKING; PATRON OF ART AND LETTERS, AND ONE OF THE BUILDERS OF THE DOMINION, I DEDICATE THIS VOLUME IN MEMORY OF OUR BOYHOOD DAYS IN THAT TOWN ON LAKE ONTARIO, NOW ONE OF THE MANUFACTURING AND COMMERCIAL CITIES OF THE CONTINENT.

PREFACE TO VOLUME THIRTEEN

Much more reprehensible than the German-American treasons in the great war and absolutely without a shadow of excuse, was that class of American citizens, not even of German descent, who, born under the Constitution of the United States, but members of Socialistic and kindred organizations, sought to overthrow our Constitution and substitute a government of a class. Though they advocated force and violence to attain their ends, they tried, in our struggle against the Hun, to check and obstruct in every way possible the military operations of the government, under the pretext that their consciences would not permit them to take the lives of their fellowmen, even in war. The destruction of life and property had no horrors when directed against the United States but the use of force in the defense of our country, they declared they conscientiously objected to.¹

¹ The report of the Attorney-General of the United States for 1918 and 1919 gives a summary of the prosecutions and convictions under the Espionage and Sedition Acts.

The Espionage Act contains a variety of provisions such as protection of neutrality, of ships in harbor, spy activities, unlawful military expeditions, etc. The cases below, under the third section of the act, are aimed at disloyal and dangerous propaganda, to interfere with recruiting and enlistment and with the operation and success of the military and naval forces. Although the Espionage Act proved an effective instrumentality against deliberate or organized disloyal propaganda, it did not reach the individual casual or impulsive disloyal utterances which occurred with considerable frequency throughout the country, irritating and angering the communities in which they occurred, resulting in violence and lawlessness and everywhere in dissatisfaction with the inadequacy of the Federal law to reach such cases. Consequently Congress enacted the Sedition Act.

U. S. v. J. A. Miller, Colo.—This was a typical attack on the war

Mrs. O'Hare (*Trial of Kate R. O'Hare*, p. 1) and Mrs. Stokes (*Trial of Rose Pastor Stokes*, p. 790) are illustrations of this type of disloyalists. In addition to denouncing our laws and our Constitution and seeking

as a capitalists' war for the purpose of obstructing the sale of Liberty bonds. He was convicted.

U. S. v. Joseph V. Stilson, Joseph Sukys, and others, Pa.—This case grew out of articles in a newspaper, the official organ of the Lithuanian Socialist Federation, and circulars belittling patriotism and military service and seeking to arouse political, as distinguished from religious, conscientious objection to service. They were convicted.

U. S. v. Victor L. Berger, Adolph Germer, J. Louis Engdahl, William F. Kruse, and Irwin St. John Tucker, Ill.—They were high officials of the governing committee of the antiwar wing of the Socialist Party and were active in framing and distributing its antiwar literature. Berger was editor of the *Milwaukee Leader*, and a Member of Congress. Germer is the secretary of the National Socialist Party. They framed and distributed in enormous quantities the proclamation and war program of the party, frankly urging disobedience of the Selective-Service Act. They were found guilty and sentenced to twenty years each. Berger was expelled from Congress.

U. S. v. William D. Haywood and others, Ill.—They were leaders of the Industrial Workers of the World. One hundred and sixty-six were included in the original indictment, of whom fifty-one were dismissed before trial and sixteen during the trial, leaving ninety-nine, all of whom were found guilty by the jury. The Government produced a large amount of documentary evidence which had been obtained by search warrant from the general headquarters of the association, including letters written by the defendants, bulletins issued by general headquarters and industrial unions, pamphlets dealing with various phases of the teachings of the organization, their songbooks, newspapers, and foreign-language papers. One hundred and forty-four witnesses were put on the stand by the Government and one hundred and eighty-four by the prisoners, of which eighty-four were prisoners themselves. They offered a large amount of documentary evidence tending to show that they were not engaged in the conspiracies charged in the indictment, but solely upon the amelioration of labor conditions. The court divided the convicted into four classes, the members of which were sentenced to confinement in the penitentiary for a year and a day, five years, ten years, and twenty years, respectively.

to overthrow both, they tried to persuade the people that the war was not one either of self-defense or for high ideals, but was brought on by the capitalists of the country for the single purpose of increasing their

U. S. v. Louis C. Fraina, Edward R. Cheyney, N. Y.—Fraina was a leading publicist of the most radical and revolutionary type of class-war doctrine. He and Cheyney, at a meeting of a "league of conscientious objectors," and in speeches and circulars, advanced the principle of conscientious objection to participation in the war, not on religious grounds, but on the principle that the working classes had no interest in the war, of which they could be only victims. They were convicted.

U. S. v. Emma Goldman and Alexander Berkman, N. Y.—They were well-known anarchist leaders; were charged with a conspiracy to bring about a failure to register, under the selective-service law, on the part of many persons liable to such registration. They organized a "no conscription league," and in speeches and publications attacked the draft law and urged young men subject to the draft to refuse to register. They were convicted.

U. S. v. Hulett M. Wells and others, Wash.—They were prominent labor leaders of the radical wing of the labor movement on the Pacific coast. While the Selective-Service Act was pending and before it was passed they prepared a no-conscription circular bitterly attacking the principles of conscription and advocating resistance to any draft law that might be passed. Meetings were arranged for the adoption of the circular and for arrangements to distribute it. They were convicted.

U. S. v. Edwin Firth, W. Va.—He prepared, published, and distributed a printed circular under the alleged auspices of an alleged "Workmen's Council of Defense," advocating opposition to the enforcement of the Selective-Service Act. He was convicted.

U. S. v. C. E. Ruthenberg and others, Ohio.—They were socialist political leaders in Cleveland, and before large audiences at public meetings, which included men subject to the draft, they attacked the draft law and urged resistance thereto. They were convicted.

U. S. v. Will Orear and others, Texas.—They organized or participated in a movement to offer armed resistance to the enforcement of the Selective-Service Act. They formed a so-called league, which included as members men subject to the draft. Meetings were held, at which plans were laid and members bound themselves to resist the draft to the last ditch. Arms and ammunition were procured and hidden ready for use. Twenty-nine persons were indicted, rep-

wealth. Each made similar appeals to large audiences in all parts of the country and each did her best to prevent the young men of the land from entering the military and naval services. But in the language they used there was a marked difference. Though Mrs.

resenting various degrees of criminality. Twenty-four were convicted.

U. S. v. Stephen Binder, N. Y.—He wrote, sent to the printer, and was preparing to circulate a book entitled "Light and Truth," attacking the causes and purposes of the war as stated by the President and Congress, attributing the war to the basest of material motives and justifying Germany. He was convicted and the circulation of the book prevented.

U. S. v. Joseph F. Rutherford and others, N. Y.—They were the executive leaders of the Russellites, a sect founded by Pastor Russell who had issued a series of books called "Studies of the Scriptures." After his death and after we were in the war they issued a seventh volume of this series, entitled "The Finished Mystery," which, under the guise of being a posthumous work of Pastor Russell, included an attack on the war and an attack on patriotism, which were not written by Pastor Russell and could not have possibly been written by him. They prepared for circulation hundreds of thousands of copies. They encouraged and organized on an extensive scale the raising of conscientious objections to the war by men called into the service. They were convicted.

U. S. v. Perley B. Doe, Colo.—He wrote and circulated a leaflet attempting to belie the official announced purposes of the war and to justify the acts of Germany which led to the war. His leaflet contained false statements. He was convicted, and after conviction was inducted into the military service, which service he refused to render and became a military prisoner.

U. S. v. Floyd Ramp, Ore.—He was an irreconcilable opponent of and agitator against the war. He went amongst drafted men who were on their way to the service and by picturing the war as a capitalists' war attempted to move them to insubordination and disloyalty. He was convicted.

U. S. v. S. J. Harper, La.—He was a state senator and prominent politician. He wrote and circulated a pamphlet along the line of the capitalistic nature of the war.

U. S. v. Clarence H. Waldron, Vt.—He was a minister who urged upon parishoners of military age the doctrine that participation in the war was contrary to Christianity and that it was their duty as

O'Hare boasted of her long American ancestry and Mrs. Stokes was the child of Russian peasants brought to this country at an early age and working for years in a cigar factory, it was the latter who may properly be described by the old Anglo-Saxon term of honor-lady. For no woman of fine sensibility and delicate feeling could have told the loyal mothers of America, who through anxious days and sleepless nights, were waiting for news of their boys on the high seas and in

Christians not to render military service. He was convicted and sentenced to fifteen years' imprisonment.

U. S. v. W. E. Mead, Wash.—He was an I. W. W. organizer, and directed his efforts not only against participation in the service of the American armies, but against participation of Canadians in the service of the British army. He was convicted.

U. S. v. Clinton H. Pierce and others, N. Y.—Distributed a leaflet entitled, "The Price We Pay," which purported to be a campaign document for the Socialist party, and contained arguments in favor of voting for that party and its candidates. But it contained violent and bitter attacks upon the war and draft law, picturing the war as a capitalists' war, and being of a tenor to convince the workingmen that this was not their war and they were not called upon to take any part in it. It dwelt upon and overstated the horrors of war. They were convicted.

U. S. v. Max Eastman and others, N. Y.—They were the owners, editors, publishers, and contributors of a monthly periodical, "The Masses." It was not an official Socialist paper, and the group of men editing it may be said to belong to the literary, as distinguished from the political, type of Socialist agitators. Its issues, practically from cover to cover, consisted of articles glorifying those who objected to war and resisted military service, and picturing the war as a base conspiracy of the capitalists, and all who participated in the war as nothing better than the abject victims of this conspiracy.

U. S. v. J. A. Peterson, Minn.—He was a candidate for United States Senator, and in the course of the campaign published an article in a prominent newspaper picturing the war as one in which the lives of young Americans were being sacrificed in order to win territory for the allies. He was convicted.

U. S. v. Louis B. Nagler, Wis.—He made an attack upon the Red Cross, Y. M. C. A., and similar quasi governmental or nongovernmental agencies engaged in the assistance of the military forces,

teenth Amendment, but whose scanty attire so shocked the country members as to cause them to pass a resolution of protest.^a

The editor recalls that in his college town a quarter of a century ago many sermons were preached against the annual Commencement balls and the wickedness of the dance. This was the day of the graceful waltz and lancers and the stately Virginia reel. Today quite different and often indecent figures are danced by the successors of those students without a word of protest from a single pulpit. Are we, in this time of extravagance and high living, better than our predecessors or are we worse? The unpardonable sin and the most hunted and fiercely prosecuted, judged by the millions of dollars being appropriated by our rulers for that purpose is the manufacture and sale and to a multitude of people the consumption of a beverage containing more alcohol than the law allows. This is an entirely new phase of Puritanism and has its strongest support in non-Puritan quarters; in Virginia, the home of the cavalier and in the two Carolinas, whose governors of yore used to bewail the time elapsing between drinks, while Massachusetts and Connecticut where the voyagers on the Mayflower settled make vigorous protests against the restrictions of the Eighteenth Amendment.

The foundation principle of Puritanism was duty. Pleasure (with the single exception of the table both in meat and drink which every one could enjoy with a clear conscience) was sternly frowned upon and strictly prohibited. The Puritans, said Macaulay, denounced bear-baiting, not because of the cruelty to the bear, but because it gave pleasure to the spectators. Therefore dancing was prohibited, the theatre was absolutely con-

^a St. Louis *Globe-Democrat*, July 9, 1919.

demned, even the reading of a play was a sin and no distinction was made between a play of Shakespeare or one of Congreve or Wycherly. So, too, novel reading was most heinous and so was fox hunting. Their war on worldly enjoyment extended to every form of art, they destroyed, where they could, the beautiful paintings and architectural monuments of the old masters and even music was thought to be an emanation from the evil one. Athletic games of all kinds were taboo, more especially a foot race, and a horse race was the acme of wickedness. The old English and Christian view of Sunday as a holiday of the church in which recreation after church hours was freely permitted, gave way to the Puritan conception of the Sabbath, transferred to another day of the week, governed by the fourth commandment, and hedged about by worse than pharisaical traditions. The Bible was regarded as not only inspired but infallible. To refuse to accept every word as dictated by the Almighty was to run the risk of being denounced as a heretic. Hence, when the progress of modern science seemed to cast doubt on the literal accuracy of some of its statements, the Puritans denounced the presumption of human learning in daring to criticise the word of God. Physical science was branded as impious if it conflicted with a statement in Genesis.

The strictest observance of Sunday was insisted upon. On that day no hospitality could be given or accepted and even to take a stroll on Sunday afternoon was subject to the severest penalties by the statutes of most of the New England states. The distinction between Sunday and other books was rigorously enforced, and there sprang up an odious literature for the young in which Sunday bathers generally came to a watery

grave; all children's toys must be hidden away, and a prominent Puritan flogged his child for giving an apple to his pony on the Lord's day. Meals were scrupulously regulated so as to compel the servants to attend church, and hot meals were absent from the homes.

But Sunday was the only day of abstinence, all the rest of the week, including Friday, the Puritan ate and drank to his heart's content. Brewing was especially a Puritan trade. The men who made fortunes out of their breweries and whose ales and beers are still drunk under their names in all parts of the civilized world were Puritans. There were no temperance societies among the old Puritans and even total abstinence was regarded as a subtle form of "works" which might do harm in leading the man to believe it might take the place of faith.

The Roman Catholic and Episcopal churches have never followed these rules, and if one were to ask today whether our modern Puritans think it wicked to dance, wicked to go to a theatre, wicked to read novels, wicked to play cards or wicked to go on a pleasure ride in an automobile on Sunday afternoon, the answer would be that though the canons of some of the largest religious denominations in this country still retain many of these prohibitions, they do not enforce them and their members pay little regard to them. As has been pointed out by an eminent Protestant bishop, we are still suffering from the false conscience which such teaching tended to produce, and though the old Puritan Sunday has in practice largely disappeared, many of those who indulge in Sunday recreation do so with an unhealthy feeling that there is something irreligious about it—a feeling which results, not in abandoning the recreation, but in alienating them from a religion which they have

misunderstood. It would have been a happy thing for the country if the older Anglican tradition which expressed itself in the Book of Sports had prevailed, and we should have much less to unlearn today.*

A sordid, cruel and treacherous murder was that of Armstrong by his friend and former partner, Hunter (*Trial of Benjamin F. Hunter*, p. 57) for the insurance which he held on his life. The element which makes this case most novel in its details is that the plot was coolly arranged so as to cast suspicion on an innocent man whose relations with the victim were such as to make his position when he was accused of the crime dangerous in the extreme, for had it not been for the accomplice's confession he would have had to face the trial instead of the real murderer.

The trials of *John Moore and others* (p. 189) and *Hugh McEvoy and others* (p. 205), will recall to a later generation the days, when in any of our large cities, the 12th of July and St. Patrick's Day were very certain to afford the citizen looking for excitement the spectacle of a real Irish set-to. In time, as Catholic emigration increased, the Orangemen got rather the worst of it, and very often thinking discretion the better part of valor, made no attempt to celebrate the Battle of the Boyne by a public demonstration. A New Yorker has recorded an exception to it in the year 1870 and its results:

"I recall the Orange, or as they were called, the Hibernian riots. Upon this occasion the little band of Protestant Irishmen who had been bullied unmercifully by the Roman Catholics and had not for several years dared parade on the 12th of July, made up their minds they would celebrate the Battle of the Boyne. This was in 1870, and the public officials, including the mayor and superintendent of police, who were sympathizers with the Catholics (then as now

* John Wesley, *The Nineteenth Century*, April, 1920.

powerful in Tammany Hall and strong in politics) gave the Orangemen no encouragement, and for a time even the governor of the State held aloof. Finally, guarded by the 84th, 9th and 6th militia regiments, they left the armory at 8th Avenue and Twenty-ninth Street and slowly marched down Eighth Avenue through a dense crowd of noisy antagonists. Meanwhile my friend and myself entered a hall door of a tall tenement house just above Twenty-fifth Street, and went up to the roof where, from the edge, we had a good view of what was going on below. Presently we saw a puff of smoke and heard the crack of a gun fired from a top window of a house further down the street which was answered by a soldier in the ranks who raised his rifle and fired, with the result that we saw a man pitch out of the window, turn a somersault or two and fall into the crowd. Then there was a fierce outburst; stones and sticks and pistol shots were fired at the soldiers and Orangemen who responded with a volley which swept the sidewalk."⁵

Seventy years have passed away since the name of Dred Scott was on every tongue. It was a bone of contention over which the greatest statesmen wrangled and an instrument in the hands of both abolitionist and pro-slavery men. The ordinance of 1787 which passed Congress almost unanimously excluded slavery from all the territory northwest of the Ohio river. But when Missouri asked to be admitted to the Union as a slave State the whole question of slavery was thrown into political discussion, and from it came the Missouri Compromise which admitted Missouri as a State with slavery but made all the region north of it free soil. But in 1854 the South was strong enough in Congress to force the repeal of the Missouri Compromise thus opening the northwest to slavery. The next election showed a majority on the other side and what should be the next move to extend slavery was a problem quite unsolved when a strange chance afforded the Southern leaders the very opportunity they were seeking.

⁵ Recollections of an Allenist (Dr. A. McL. Hamilton), New York, 1916.

This strange chance was the suit in the St. Louis Courts of *Dred Scott v. Emerson* (pp. 220-233) and *Sanford* (p. 242) that had reached, on appeal, the nation's highest tribunal. For here was a case where the Supreme Court might possibly declare that all legislation by Congress was contrary to the Constitution of the United States. Mr. Hill, in his "Decisive Battles of the Law," tells in a striking way what happened:

"Almost immediately after the final argument it was taken up by the judges' private conference and the majority voted to affirm the decision of the court below, Judge Nelson being assigned to write a brief opinion which was to avoid all reference to the constitutionality of such restrictions as the Ordinance of 1787 and the Missouri Compromise and merely commit the court to an affirmance of the decision of the State court treating the issues as local questions with which the Federal tribunal was not inclined to interfere. Before Mr. Justice Nelson could prepare this opinion, however, the active agents of the slave power intervened. At dinners, receptions and social functions of all sorts they waylaid the judges, adroitly importuning them to change their plans, flattering those whose vanity gave the necessary opening, appealing to the ambition of others and generally emphasizing the opportunity which lay before the court to fulfill a public and patriotic duty by forever quieting a discussion injurious to the country's welfare. Declare all such restrictions against slavery as the Missouri Compromise unconstitutional, it was urged and the North will acquiesce and the Union be preserved. Avoid the issue and the agitation will precipitate a national disorder. All of the judges were honest and conscientious, but some of them were far advanced in age, the political excitement was intense and the pressure which was constantly brought to bear on them was well calculated to disturb their judgment. . . . Another judicial conference was held at which it was decided to change the plan already agreed upon and to meet the expectation of the public by passing directly upon the political issues involved. This, of course, meant nothing less than a declaration that territorial restrictions against slavery were unlawful and from the moment this step was decided upon all the judges were busy with their law books and their pens. Thus the time slipped by without any announcement from the court and it was not until the 4th of March, 1857, that an intimation reached the public of the court's intentions. That intimation, how-

But there were blunders, nevertheless, in the trial, but not on the part of the prosecuting officers. Several experts swore that the writing on the label was the same as that of papers admitted to be in Dr. Graves' handwriting. After his death a man came forward who told the true story of the inscription. He said he had written it at Dr. Graves' request in the Boston Postoffice, that he did not know Dr. Graves at the time, having simply done a favor for a man he thought had difficulty in writing. Handwriting experts, though they are loath to admit that they themselves are ever wrong, may, as this shows, make mistakes even when a man's life is at stake. The Supreme Court reversed the conviction, holding the instruction of the trial judge to the jury that each link in the chain of circumstantial evidence must be complete within itself, was not an accurate instruction and that the Court should have used the simile of a strand of cable, a rather subtle distinction but of a class which many appellate courts are very fond of.

The conviction of Dr. Graves was based entirely on circumstantial evidence, for no witness at the trial could testify that he saw the murderer administer the fatal drug. But crimes of this character are always committed in secret. A large part of the murder trials in this series and the majority of the capital convictions have been based on this kind of evidence.⁹

⁹ Weeks, 1 Am. St. Tr. 1; Colt, *Id.* 455; Spooner, 2 *Id.* 175; Mayberry, *Id.* 790; Hanlon, 3 *Id.* 306; Epes, *Id.* 412; Cherry, *Id.* 562; Webster, 4 *Id.* 93; Arrison, 5 *Id.* 1; Cunningham, *Id.* 90; Simpson, *Id.* 369; Twitchell, 6 *Id.* 1; Boorn, *Id.* 73; Chapman, *Id.* 99; De Mina, *Id.* 397; Carawan, *Id.* 514; How, *Id.* 865; Thayer, 7 *Id.* 1; Ballew, *Id.* 324; Gilman, *Id.* 755; The Lincoln Conspirators, 8 *Id.* 25-494; Surratt, 9 *Id.* 1; Worrell, 10 *Id.* 1; Frank, *Id.* 182; McConaghy, *Id.* 601; Robinson, 11 *Id.* 528; Robinson, 12 *Id.* 426.

While its admissibility is a question of law to be decided by the court, the weight to be given to circumstantial evidence is one for the jury alone, and an appellate court will not interfere with a verdict of guilty founded thereon, any more than it would with a similar verdict based upon the most direct and positive proofs.

Still, it must be admitted that there are many men who are unwilling to condemn a person on this kind of evidence. How frequently when there is a disagreeing jury, does it turn out that the dissenters base their refusal to concur upon the fact that all the proof presented by the prosecution was circumstantial and that no one was called who saw the prisoner commit the crime charged against him. Again and again, in empanelling a jury, juror after juror is rejected by the State because he declares that he will not convict on circumstantial evidence.¹⁰

But very different is the attitude of courts, judges and juridical and philosophic writers, many of whom have declared that circumstances are inflexible proofs; that witnesses may be mistaken or corrupt but things can be neither. "Circumstances," says Paley, "cannot lie." "When," says Burke, "circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof." And eminent English judges have used language of this character in charging juries.

"Where," said Baron Legge on the trial of a daughter for poisoning her father, "a violent presumption necessarily arises from circumstances it is more convincing and satisfactory than any other

¹⁰ Our highest courts have ruled that it is a good ground for challenging a juror by the State that he says he will not convict on circumstantial evidence, however strong or where the penalty is death. 24 Cyc. Law & Proc. 309; State v. West, 69 Mo. 401.

kind of evidence because facts cannot lie." Mr. Justice Buller in a charge to a jury, declared "That a presumption which necessarily arises from circumstances is very often more satisfactory than any other kind of evidence because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt without affording opportunities of contradicting a great part, if not all, of those circumstances."

And one of the greatest of American jurists told a Pennsylvania jury (Gibson, C. J., 4 Pa. St. 271):

"No witness has been produced who saw the act committed; and hence it is urged for the prisoner that the evidence is only circumstantial and consequently entitled to a very inferior degree of credit, if to any credit at all. But that consequence does not necessarily follow. Circumstantial evidence is, in the abstract, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility. . . . The only difference between positive and circumstantial evidence is that the former is more immediate and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers or mangled by wheels on a railroad, you are not to lay aside the steam engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual and not technical disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that

his conscience is clear. Certain cases of circumstantial proofs to be found in the books in which innocent persons were convicted have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years in a country whose criminal code made a great variety of offenses capital. The wonder is that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is legal evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence."

And Chief Justice Shaw, in affirming the conviction of Professor Webster,¹¹ said:

"Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is that it is the direct testimony of a witness to the fact to be proved, who if he speaks the truth, saw it done; and the only question is whether he is entitled to belief. The disadvantage is that the witness may be false and corrupt and that the case may not afford the means of detecting his falsehood. But in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts which by experience have been found so associated with the fact in question that in the relation of cause and effect they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow it is certain that some animated being has passed over the snow since it fell; and from the form and number of the footprints it can be determined with equal certainty whether they are those of a man, a bird or a quadruped. Circumstantial evidence therefore is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the facts sought to be proved. The advantages are that as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are that a jury has not only to weigh the evidence of facts but to draw just conclusions from them; in doing which they may be led by prejudice or partiality or by want of due deliberation and sobriety of judgment to make hasty and false deductions; a

¹¹ 4 Am. St. Tr. 93.

from partisan or political motives. Nothing can be more foreign from one's notions of what is high-minded, noble, or religious and one must visit a man who would so act, not for God's honor, but using God's honor for his own purposes, with the most disdainful disapprobation that the human mind can form."¹³

Christianity is so interwoven into our municipal law that the laws of both England and the United States must upon principles of general jurisprudence be in accord with its positive rules. But this cannot make it a crime to argue against Christianity any more than it is a crime to argue against the common law or against any statute in force at the time. Many books have been published in which infidelity is professed and defended, but their authors have not been indicted for blasphemy. The judicial line is drawn where in the language of Lord Hale the Christian religion is "reproached." There is said to be no instance of the prosecution of a writer or speaker who has applied himself seriously to examine into the truths of our religion and who in arriving in his own convictions at skepticism or even unbelief, has gravely and decorously submitted his opinions to others, without any wanton or malevolent design to do mischief. But the good sense and right feeling of mankind have always declared strongly against the employment of abuse and ribaldry upon subjects of this nature. Does the publication cast reproach and insult upon what in Christian minds are the peculiar objects of veneration? Is the language used calculated to shock the feelings of every Christian reader or hearer? This is the true test.

The speeches of the lawyers to the jury and the address of the defendant himself are most interesting. The most celebrated speech on a trial for blasphemy

¹³ *Life of Lord Coleridge* (E. H. Coleridge) II-292.

is, without doubt, that of Talfourd,¹⁴ one of the orators of the English bar of the last century, afterwards a distinguished judge and the author of *Ion*, one of the few classic dramas of the period, on the trial of the publisher of the works of Shelley the poet, for alleged blasphemy in his poem, *Queen Mab*. His client was convicted, but his address to the jury is an example of eloquence at the bar that has its equal only in the great oration of Robert G. Ingersoll in his defense of a free-thinker named Reynolds in New Jersey in the year 1887.¹⁵

In the preface to the pamphlet containing the trial of *Melvin and others* (p. 576) it is offered to the public as "highly important to all artisans and mechanics as well employers as workmen, well worthy also of perusal of the gentlemen of the bar. And that neither in point of instruction or amusement is it foreign to any class of readers as it will be found to contain much legal history with the attractions of novelty, fancy and humor."

Between 1800 and 1810 as one of the most readable of American historians has shown, the spread of population, the increase in the number of farms, and the rush of men into the merchant marine raised the pay of the unskilled laborer very perceptibly. During this period men who could drive piles or build roads or dig ditches or pave streets or tend a machine in any of the factories, or were engaged in transportation, were sure of a job at what was then considered a high wage.¹⁶

¹⁴ Talfourd, Sir Thomas Noon (1795-1854.) Born Stafford, England. After admittance to the bar, he followed for a time a literary career; was on the staff of several newspapers; wrote "*Ion*" and other tragedies; D. C. L., Oxford. He died suddenly while on the bench.

¹⁵ Which will appear in Vol. 16 Am. St. Tr.

¹⁶ Not, however, according to the standards of today, for one ad-

The wages of skilled workmen, however, underwent no such increase and the labor organizations now attempted to force them up by strikes. They, at that time, were generally for benevolent purposes solely, and were scattered all over the State of New York and the neighboring states. They were of two kinds—societies made up of artisans following all sorts of trades or in the large cities composed of men of one craft. Examples of the first were the Albany Mechanical Society, the Catskill Mechanical Society and the General Society of Mechanics and Tradesmen of the county of Kings. Examples of the latter were the New York Masons' Societies, whose members were either plasterers, bricklayers or stonemasons; the New York Society of Journeymen Shipwrights, the Franklin Topographical Society and the Journeymen Cordwainers of New York City. In Philadelphia were the Society of Hatters and Journeymen Cordwainers. In Baltimore there had long been a society of Journeymen Tailors. When about 1805 the pay of the unskilled laborer began to rise and that of the skilled laborer did not a series of strikes was inaugurated. The Journeymen Tailors of Baltimore had as early as 1795 forced up wages and again in 1805; almost at the same time the Journeymen Cordwainers struck in Philadelphia. This was stoutly resisted and the strikers brought to trial in the Mayor's court charged with conspiracy to raise their wages—the first case in the American courts on this subject. The indictment was under the common law and the shoemakers were convicted. Two years later the Journeymen Tailors struck for a third

vertisement for thirty men to work on the road from Genessee River to Buffalo offers twelve dollars a month, food, lodging and whiskey every day.

time in Baltimore. Each side appealed to the public. The journeymen demanded nine dollars a week, which was no more, they declared, than was paid to the common laborer who had not spent an hour learning his business while they had spent seven years. The master tailors replied that the journeymen were becoming high-handed. Not only had they refused to work at the old wages but they had forced men who were willing to work to stop, and had threatened to tar and feather any lawyer who prosecuted them. Few masters in the city made a thousand suits a year and none were paid more than seven dollars for making one. To yield to the demand of the journeymen was therefore impossible unless gentlemen were willing to pay more for their clothes. The end was a compromise.¹⁷

From Baltimore and Philadelphia discontent spread to New York, and in October, 1809, the Cordwainers of that city went on strike, and, as this trial shows, all of them were convicted of conspiracy. Nowhere else in the law reports is to be found such an elaborate statement of the common and statutory law and the history of the contests between capital and labor up to this time as in the speeches of the lawyers to the jury.

Had we in this country a collection like that of Madame Taussaud's in London, Brooks (*Trial of*, p. 702) would deserve a place as one of a trio of which his companions would be Hunter^{17a} and Epes.^{17b} A St. Louis criminal judge wrote a graphic sketch of the assassin and his victim which deserves to be preserved:

Two English fathers and two English boys. One English father a man of commanding resources; the other a man of means quite suffi-

¹⁷ McMaster, *Hist. People of U. S.*, 2-510.

^{17a} 13 *Am. St. Tr.* 57.

^{17b} 3 *Am. St. Tr.* 412.

cient to supply the family wants; both English fathers proud of their growing boys and anxious that their future may be of profit and honor. One English father perplexed in deciding which of the genteel professions his son shall adopt; the other wondering whether by stinting and saving he can lift his son to a higher and easier calling. Two hatless boys at play in school yards, miles apart—merry, light-hearted, careless boys; and yet so fate who lingers near, decrees it, upon the smooth brow of one is to be set the mark of Cain, upon the smooth brow of the other the untimely death-agony of brother-slain Abel. Two full-grown youths entering upon their careers; one of them by the grace of his father's great wealth, to develop at his leisure and under the best masters his talent for music; the other by the grace of his father's self-sacrifice, to study law.

Two young men preparing themselves for professional life—the one earnest, steady, devoted to his work; the other light and frivolous and careless of the great boon which his father's self-sacrifice has placed within his reach. Misfortune falls upon the rich man. Laying aside, not without regret, but with high-born, noble courage, his cherished plan to cultivate his gift of melody, he whom his father's failure has struck so sorely, enters upon commercial life and becomes a traveller; the poor man's son, stays at home and studies. The young lawyer has forgotten the precepts of his early days. He meets temptation halfway and revels in the debasing pleasures of the hour.

At duty's call the one undertakes a voyage, first to America and then to the antipodes. Flying from the consequences of an evil career, the other decides to leave his native land. In a moment their destinies that seemed so distant, unite. The strong man and the weak, the man pursuing an honorable avocation and the man flying from his dishonorable life—the men so different in all things that make a man—meet on the same ship and become friends.

The one well supplied with funds, frank, generous and unsuspecting, reveals himself in his true colors to his fellow-countryman. The other, short of money, close, cunning and avaricious, plays a mean part in order that he may the better avail himself of his friend's comparative opulence. The better to ingratiate himself with him he assumes the role of an aristocrat; and his friend with an Englishman's weakness for transmitted nobility, feels honored by the association. The shrewd business man is befogged by the petty cunning of the little country lawyer, and finds pleasure in the companionship of the quasi-aristocrat.

They reach America and together plan a journey to New Zealand. The two men part in the east. Distance again separates them. One goes to Canada; the other comes to St. Louis. Distance is anni-

hiliated and the friends are once more together. They occupy the same hotel and discuss together the same plan of travel. The one has no means with which to make the voyage. He is at the end of his tether. He has but one card to play—the generosity of his friend. He plays it and loses. The other a business man: business is business—declines to help his supposed noble companion. With apparently undisturbed friendship the one continues to be the others companion. He plays billiards with him, drinks with him, walks with him and when they are in their rooms together, regales him with bright conversation, and all the while is devising a way to destroy him. Fate supplies the opportunity. One peaceful Sabbath afternoon the former complains to him of a passing malady. Among other of the other's impostures is that he is a diplomaed physician and his friend has no fears in placing his life in his hands. The only question is one of skill and the forged diploma imposed upon his companion makes doubt upon that score out of the question. The opportunity is seized and Abel surrenders himself to the mercy of Cain. While Abel bares his arm for the reception of the balm which is to relieve his pain Cain injects into his veins the sleep of death. He empties his trunk of its contents, he undresses his victim and lifts the still breathing body from the bed. The deed is done. . . . Fate stays by him and mars his every effort at concealment. He resolves to disguise himself and when his face is shaved and his hair cut he lets the barber know why he effects the change. He goes upon the street with his friend's money and displays it in places where he had previously given proof of his impecuniosity. He buys a hat to make him look less like an Englishman and tells the hatter that he is seeking a disguise. In a hundred ways he leaves behind him a trail that the dullest detective could not fail to follow. Crossing the continent he excites attention instead of cultivating seclusion. . . . The tedious voyage made to him unendurable by the play of conscience upon his fears is nearly over. The glad cry of "Land" is heard. A flood of pleasant emotion comes over him for he thinks that once there he will be safe from the consequences of his crime. Only a few short hours and then—Fate is again at his side. A moment more and a stern hand is laid upon his shoulder. It is the law which claims him, her demand is—a life for a life.¹²

The case of *Von Ritter* (p. 782) presents a system established very early in American colonial history by which an emigrant could get to this land though not

¹² Noonan, E. A., *post*, p. 706.

able to pay for his passage by agreeing to serve from three to seven years in the colonies until the price of his transportation was paid to the shipmaster who had advanced it. At the end of his term he was released, given a suit of clothes, sometimes money or land and awarded all the rights of a free citizen. Hence the term "redemptioners" (redeemed) which was applied to this class of emigrants who were known as "indented servants." At first the system seemed liberal. It had been adopted by the agent of William Penn, and had been in vogue in Virginia since the first decade of that colony's existence. It was applied extensively to German immigration. Muhlenburg thus describes the arrival of a ship in Philadelphia:

"Before the ship is allowed to cast anchor in the harbor the immigrants are all examined as to whether any contagious disease be among them. The next step is to bring all the new arrivals in a procession before the city hall and there compel them to take the oath of allegiance to the king of Great Britain. They are then brought to the ship and those who have paid their passage released the others are advertised in the newspapers for sale. The ship becomes the market. The buyers make their choice and bargain with the immigrants for a number of years and days, depending upon the price demanded by the ship captain or other merchant who made the outlay for transportation. Colonial governments recognize the written contract which is then made binding for the 'redemptioners.'"

But the profits in the transportation of redemptioners being greater than that of passengers who paid their way the latter were made the victims of extortions from the very beginning of their journey down the Rhine, and it became the practice to hold the entire body of emigrants responsible for the total transportation charges. While this arrangement protected the captain against loss in case some of the redemptioners died on the way it also gave him an excuse for extortions.

The Germans of Philadelphia attempted to legislate against these abuses beginning in 1750, but for a long time were unsuccessful because of the presence in high places of influential grafters heavily interested in the profits of emigrant transportation. They, however, after repeated agitation, succeeded in improving existing conditions. Then charitable organizations were formed to extend a helping hand to the emigrants of their own nationality, and they established the emigrants' right of appeal to American courts in case of unjust treatment. The sale of redemptioners was not abolished until 1820. With its many evils the system had good effects and undoubtedly the rapid increase of the population of Pennsylvania was due to the redemption system which allowed tens of thousands of the poor of Europe to come to America who would otherwise have been unable to do so.¹⁹

The trial of *Rose Pastor Stokes* (p. 790) introduced to the jury in the form of legal evidence and preserves in our judicial archives, the world renowned address to the Congress on the declaration of war against Germany and that more important historical document—the statement of President Wilson as to the conditions on which a just and permanent peace was possible.

¹⁹ Faust (A. B.), *The German Element in the United States*, 1-66-72.

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THE TRIAL OF KATE R. O'HARE FOR DIS- LOYALTY, BISMARCK, NORTH DAKOTA, 1917.

THE NARRATIVE.

Kate Richards O'Hare had been, before the Great War, a prominent member of the Socialist Party; had attended its conventions as a delegate in Europe and this country; had written books and edited a newspaper devoted to Socialism, and was well known as a lecturer on Socialistic doctrines. One of the tenets which she advocated publicly after the invasion of Belgium was "Peace at any price," and she did everything in her power to influence public opinion to this end. After the United States declared war on Germany she appeared in a convention of the Socialist Party at St. Louis and was the head of a committee which reported a series of resolutions declaring that our entry into the war was a "crime against the people of the United States and the nations of the world"; that it had been brought about by the capitalists of America "to coin profits out of the blood and suffering of our fellow men"; recommending "unyielding opposition to all proposed legislation for military or industrial conscription"; that "we instruct our elected representatives in Congress and in the State legislatures and in local bodies to vote against all proposed appropriations or loans for military, naval, and other war purposes"; and that "we initiate an organized movement of Socialists, organized workers, and other anti-war forces for concerted action along the lines of our program." A few weeks later, at the time when the United States was endeavoring to rally the manhood and womanhood of the land to the country's defense, through the draft, the Liberty loan, and other war activities, she went on a lecture tour through the South and West and told her hearers that the war was to protect the capitalists,

and that if they had loaned their money to Germany instead of to the Allies we would be fighting for Germany instead of against her; that the way to stop it was to strike, and if the laboring men and women of the Nation were to strike, it would soon be over; that she had boys who were not old enough to be drafted, but if they were they would not go; and that mothers who raised sons to go into the army were no better than the animals on a farm.^a In her tour she stopped at the town of Bowman, N. Dak., and in a paid lecture there to several hundred persons said, among other things:

"Any person who enlisted in the army of the United States for service in France would be used for fertilizer and that was all he was good for, and the women of the United States were nothing more or less than brood sows to raise children to get into the army and be made into fertilizer."

The United States authorities concluded that this must be stopped. The grand jury of the Federal court in that State indicted her under the Espionage act for willfully obstructing the enlistment and recruiting service, and, after a trial lasting several days, she was found guilty. When called up for sentence she made a long harangue, posing as a martyr and comparing herself to Spartacus, Wat Tyler, Patrick Henry, George Washington and Jesus Christ; but the judge, in scathing words, sent her to the penitentiary for the term of five years.

THE TRIAL.¹

*In the United States District Court, Bismarck, North Dakota,
December, 1917.*

HON. MARTIN J. WADE,² Judge.

July 30.

The prisoner, *Kate Richards O'Hare*, had been indicted by the grand jury on July 27 for violating section 3 of the Espi-

^a Judge Wade, post p. 37.

¹ *Bibliography.* "In the United States Court of Appeals, *Kate Richards O'Hare*, plaintiff in error, vs. United States of America,

onage act, which declares that "whoever, when the United States is at war . . . shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States," shall be punished as therein provided. The indictment contains two counts, both alleging that the prisoner stated, in substance, in a public speech in the town of Bowman, N. Dak., in the presence of 125 people

"that any person who enlisted in the army of the United States for service in France would be used for fertilizer, and that is all he was good for; and that the women of the United States were nothing more or less than brood sows to raise children to get into the army and be made into fertilizer";

and that such statement so made was made with the intention of willfully obstructing the recruiting service of the United States, to the injury of the service of the United States.

Kate Richards O'Hare, being arraigned today, pleaded *not guilty*.

Melvin A. Hildreth,³ district attorney, and *John Carmody*⁴ for the Government; *Verner R. Lovell* for the Prisoner.

defendant in error. Brief of plaintiff in error. V. R. Lowell, H. F. Horner for plaintiff in error."

"United States Circuit Court of Appeals, Eighth Circuit. *Kate Richards O'Hare*, plaintiff in error, vs. United States of America, defendant in error. Brief for defendant in error. M. A. Hildreth, United States attorney, John Carmody, assistant United States attorney, attorneys for defendant in error."

"Transcript of record. United States Court of Appeals, Eighth Circuit, No. 5111. *Kate Richards O'Hare*, plaintiff in error, vs. United States of America, defendant in error. In error to the District Court of the United States for the District of North Dakota. Filed February 28, 1918."

² WADE, MARTIN JOSEPH. Born 1861, Burlington, Vt.; educated at St. Joseph's Coll., Dubuque, Iowa; graduated Univ. of Iowa, LL. B., 1886; practiced law, Iowa City, 1886-93; judge Eighth Judicial Dist., 1893-1902. Member 58th U. S. Congress, 1903-05; judge U. S. Dist. Court, Iowa, since 1915; prof. med. jurisp., Univ. of Iowa, 1895-1905; lecturer on law, 1891-1903.

³ See 12 Am. St. Tr. 900.

⁴ See 12 Am. St. Tr. 900.

December 5.

The following jurors were selected and sworn: R. L. Clapper, A. L. Peart, George McIntyre, W. N. Nortz, J. J. Nygaard, George R. Cook, J. F. Brenton, Edgar W. Blaisdell, Joseph A. Pierce, C. L. Williams, Fred Bangaster, L. H. Dougherty.

December 6.

Mr. Lovell moves that the case be dismissed, as the indictment does not show any actual violation of the Espionage act.

The COURT. Objection is overruled.

THE WITNESSES FOR THE GOVERNMENT.

J. E. James. Am a farmer near Bowman; on 27th April last went to Mrs. O'Hare's lecture there at the Cozy Theatre; Bowman has about 800 population; she spoke about two hours; she said she had spent the last five years traveling here and in Europe delivering addresses on Socialistic reform; that she was the original editor of the *Ripsaw*, which had been stopped going through the mails, and author of several books on Socialism; that we were drawn into this terrible catastrophe and that she was going to do all she could against it. She said if mothers became pregnant for the purpose of bringing sons into this world for cannon fodder they were no better than farmers' sows. She said she was brought down to death's door to bring a son into the world, but thank God that he was not old enough to come under the draft, and if he was he wouldn't have to go. She also said of course if any young man is foolish enough to enlist and go over there and fight, why, we can not help that; he is either—he was good for either German or French fertilizer. At this time we were arranging to carry out the draft law in our county and the town

was placarded with appeals to enter the army and navy.

Cross-examined. Before this I had read a little from one or two of her books; there were about 150 in the audience, mostly adults; know Mr. Phelan; did not talk with him about this lecture; have not been much interested in politics lately; there was a good deal of feeling between rival factions in Bowman at this time; my son enlisted in May; thought her talk reflected on our family and was seditious too; it rather angered me; saw Mr. and Mrs. Totten at the lecture.

She said she had a husband living in Florida, I believe; that he was a contractor; and she was out working for the betterment of mankind, uplift of society and trying to stop this horrible war. She wasn't going to sit by with her hands folded and let her son be made into fertilizer.

Dr. A. A. Whittimore. Am a physician, practicing in Bowman; was at Mrs. O'Hare's lecture; think there were 200 or 250 people there; some were young men. There were two or three things that made a special impression on my mind at the time, and the first thing I can

recall now is that she stated she had no objection to men volunteering for the army if they were fools enough to do so, but that they would make good fertilizer anyway. She objected very strongly to these men going because they had to go in the draft and stating that if the mothers would—she was contrasting the difference between the Government's power to call men and the mother's right to determine the destiny of her sons, as I understand it, and she said that if the Government had a right to conscript or draft men into the service it was placing the women on a level with the ordinary brood sow. And another thing that impressed me was her statement regarding the cause of the war. She said it was not in order to make democracy safe or to protect the lives of American citizens, but to protect Morgan's millions that he had loaned to the Allies for the war and to enrich the munition factory owners; another statement that—I think she was talking about the clergymen or the church regarding their sympathies and actions in the war—and she said they were making the churches recruiting stations and that the priests and preachers were recruiting officers. That is all that I can recall at this moment.

Cross-examined. There has been strong political feeling in Bowman at times; Socialists have a good many adherents there; a good many foreigners in the city and county; mostly Scandinavians, but some Germans.

Joe Hawks. Am a stockman at Bowman; heard the lecture

from the door of the theatre. The first I remember was she was talking about the condition, the circumstances, of the women in Belgium, and said ordinarily they were not treated any better than brood sows, and that led up to the fact that if our mothers would grow children to be made cannon fodder of that they were no better than those Belgium women. Then the train came in and made quite a noise there and I wouldn't state exactly what the rest was, but I remember then she spoke about the causes of the war. She said she didn't think it was for democracy; it was for the Morgan millions; and she talked about the causes that led up to that and spoke about our losing some lives there if I remember rightly; and then she said about Wilson that after he was elected and inaugurated Mr. Patience came down from his high pedestal and declared war. Part of the audience seemed to approve what she said; have heard of the political fight in Bowman; take a side myself, but don't bother much about politics; think most of the audience were foreigners.

Mrs. George Olson. My husband is a grain buyer; we live at Bowman. Heard Mrs. O'Hare from an auto just outside the door. The first I heard her say she spoke on her travels abroad. She mentioned several colleges where she lectured. She spoke of conditions in war-stricken countries. She also told about the Belgian women and the suffering they were going through on account of the war. She goes on to say she has a boy who, thank God, wasn't old enough for the draft; that she would

hate to have him undergo the same fate that the soldiers abroad were undergoing at that time; but if he saw fit to enlist and didn't know any better, any boy that would do that was only fit for fertilizer. She also went on to say that the Republicans and Democrats seemed to accuse the Socialists of wanting war, but it was done without any aid on their part. She goes on to say that we elected President Wilson because we thought he would keep us out of the war, but that we had forgotten that Morgan's millions had to be gotten back from the old country. Therefore he called upon some of the best young men in the country to help him recover them. She goes on to tell that the public at large didn't want war. She said there was only three classes of men to her knowledge who did not care whether we had war or not. One of the classes were the Catholic priests and so-called ministers, who, under the cloak of the church, were excused from the draft. Those men didn't care whether we had war or not. The second class of men was the profit-makers, the munition makers and the big men who profited by the war. Those men didn't care how long the war lasted. The third class of men was the has-beens, the men who were bald-headed and had a paunch on them that they couldn't drag to war if they wanted to. Those were the men who didn't care whether we had war or not. She goes on to mention about conditions in the Belgian country and the suffering women were undergoing.

She tried to demonstrate that such things might befall the American women if the war was continued. That women had no right to speak for their boys. If they were called by the country they must go. That all they were called upon to do was to suffer to bring the boys into the world. After that they had no say in the matter. In other words, they had no more to say in the birth of their children than a common sow.

Cross-examined. Am of Danish descent; my husband is from Norway; have a nephew in the war; I talked about it that evening of the lecture. They asked me if the lecture was over and I told them no; and they asked me why I didn't stay and I told them I was disgusted with it.

Ole Hanson. Was at Mrs. O'Hare's lecture; saw young men there who were subject to the draft; but don't recall more than two by name; she mentioned at one time that she had a boy and she said "thank God he is not old enough and if he was old enough he would not have to go" and the women that raised a boy for the army was classed about the same as a brood sow. And the boys that enlisted and volunteered for the army they were nothing but the scum of the country and they would make good fertilizer for French soil.

Cross-examined. Don't recall her saying, "Don't quote me as being opposed to any boy enlisting in the army. If he feels he has to go, let him go and God bless him."

Mr. Lovell moved the court to direct a verdict for the defendant for the reason that no public crime or offense had been proved against her by the witnesses who have just testified.

The COURT. The motion is denied.

THE DEFENSE.

Mrs. Kate R. O'Hare. I am the defendant here; I delivered a lecture at Bowman in July last; I believe in the tenets and doctrines of the Socialistic party. I have held every elective position within the gift of the Socialist party of the United States. The Socialist party has an international organization embracing the Socialist parties of every civilized country on the globe. Internationally the executive body of the international organization is known as the International Bureau, and to this bureau every labor organization and Socialist party in the world elects their representatives or their delegates as they are called. I have been a representative of this country in the International Bureau, sitting with the prominent Socialists of European countries, such as Kerensky. The position of the Socialist party is absolutely against settling the problems of the world by physical force; that they should be settled by ballot.

Since the United States declared war I have not opposed but have hoped that it would be the last war; since its adoption I have not opposed conscription, though asked a thousand times to do so; I have not opposed it by word or writing or in any other way. I have never tried to interfere with the Government plans for carrying on the

war nor with the Liberty loan or the Red Cross work. The people's council or the I. W. W. are not associated with the Socialist party in any way. The lecture I gave at Bowman was a carefully prepared one; have delivered it at least 135 times. I very carefully prepare my outline, decide the phases I want to cover, then work up the explanatory matter and in that way work out a lecture just as I write a book or as a musician prepares a composition in music or as a mechanic draws a blueprint for a machine. When it is finished it becomes a part of my repertory. This lecture at Bowman was subheaded into six general divisions. The first, a statement about the Socialist party being charged with trying to do certain things, one of them being to plunge the world into war; another to destroy civilization; another to destroy Christianity; another to degrade women; another that the Socialists believe that the child is the property of the state and not of the parent; and to confiscate the property of the people. That was the statement. And I went on to prove that all of these things—that the war had come and the Socialists were not responsible for the war and all these other things had come as a result of war. Then my conclusion was that I, like other Socialists, hated war, wanted to

see the end of war and the hope I had that this war might be the end of all war and that the only hope was in overthrowing the economic system that creates war. I went on to show that the economic system that creates war was being actually overthrown by this war and that I was very hopeful of the future because of the fact. That covered the outline of the lecture. I always adjust the vocabulary of a lecture to the intellectual requirements of my audience. If I am speaking to a group of college students I use the academic language common in college. If I am speaking to a Southern audience I use the words common to the South. If I am speaking to a farmer audience I use the words and terms most commonly used by farmers in order to bring the thing directly to their mind. In this lecture I had no purpose to obstruct enlisting or recruiting; I never said what the indictment charges as to "fertilizers" and "brood sows." I said, "Please understand me and do not misquote me and say I am opposed to enlistment; I am not. If any young man feels that it is his duty to enlist in the army of the United States then he should enlist and God bless him." I said, "His blood may enrich—or possibly fertilize—speaking to farmers—"His blood may enrich the soil of France." Then I stopped and questioned, Perhaps that may be the best use for it. As to the other, what I said was, when the governments and churches of the European countries demanded of the women of Europe that they should give themselves to the soldiers going away to war

in marriage or not, in order that those soldiers might breed before they died—that when the church and government demanded that of women they reduced them to the status of breeding animals or brood sows on a stock farm.

I had absolutely no intention of bringing American women into it in this connection. To have done so would have involved myself, my mother, my grandmothers and all my ancestors back into revolutionary times.

My father served in the Federal army all through the Civil war and I have had relatives in the service of the United States in every war since the Revolution. I am American born of Irish-Welsh extraction, and my family has been in this country for many generations. I was afterwards prevented from delivering this lecture at Devils Lake in this State by my arrest.

Mr. Hildreth. Before you started your lecture you looked around the room and sized up the class of people that were to listen to you, did you not? I always do and did at this time. And having sized up the people that were there you reached the conclusion that it would be necessary for you to use a vocabulary that would fit the minds of the people that were there to listen to you, is that true? I decided that it would be wisdom on my part to use the words commonly used by the majority of my audience. So that you were satisfied on looking over the audience there that evening that the great majority of the people that were there present belonged to that line of folks that would need the

use of words from the vocabulary to which you have called the court and jury's attention? I decided that the majority of the people were farmers largely of foreign extraction, judging from their faces, and that it would be wisdom on my part to use the vocabulary of their every-day life. The object of my lecture was to attempt to convince people that my attitude to all war was well founded. Were you on the platform as a free lecturer or did you receive compensation? I am employed by a lecture bureau and receive compensation.

I have been in touch with the Socialist leaders in Europe up to last week; but not those of Germany since the war. They were all opposed to the war; I told the people in Bowman that I was against the war, but told the young men that if they felt it their duty to enlist to do so and God bless them.

The grand objective of my lecture was to prove to the people that we all hated war and that my belief was that the way to kill war was by eliminating the profits from war.

I can't say that I understood what our war was being waged for if it was not to defend the Morgan interests. Now, the understanding is the war is being waged in defense of democracy. I believe that democracy will grow out of the results of the war.

I have a number of acquaintances among prominent Socialists in Germany. As international secretary I received every month up to the breaking out of the war a portfolio containing communications from all of the

various countries. In that were communications from Germany, France and all countries.

I do not speak any language but English. I have been affiliated with the Socialist party since 1899.

Edward P. Totten. Am judge of the County Court of Bowman; attended Mrs. O'Hare's lecture with my wife and a stenographer; heard it all; did not hear her say what she is charged with in the indictment as to "fertilizers" and "brood sows," nor did she say anything in opposition to enlistment and recruiting; I remember hearing Mrs. O'Hare say at that time in substance if any young man desires to enlist or volunteer, let him go and God bless him.

Cross-examined. The audience were nearly all farmers; she was applauded but not by my wife or myself; she subpoenaed me here and is to pay my expenses.

As I understood the lecture, it was solely a defense of—an explanation of the attitude of the Socialist party and of Socialists against the charges of enemies of socialism and an explanation of the position of the party with relation to war generally.

I did not ask her to come to Bowman to lecture, but she called at my house; think she was brought to Bowman by Mr. McFarlane. There is a political hostility between the faction he belongs to and the one Dr. Whitmore belongs to. The same is true as to the other witnesses for the prosecution. I am opposed to them, as they belong to the Phelan faction.

Mrs. E. P. Totten. Am wife of last witness; attended the

lecture; did not hear her say the things charged in the indictment; heard her say if any man desired to enlist, let him go and God bless him; the crowd was largely adult. She told of her trip to Europe just prior to the war and described the beautiful country that was now being devastated by war and spoke of it as being blood-soaked. She said that the young men that went from here to France their blood might fertilize the French fields. She was developing her point that she was making about the Socialists—that they had not brought about the destruction of the home, but that war had; and that the war had so lowered the position of women in Europe it placed them in the position of brood sows on a Montana stock farm.

Cross-examined. Am interested in her; she has visited at my home; I want to see her get a square deal; I did not agree with everything she said.

Charles T. Olson. Live in Bowman County; am a farmer; was at the lecture, but did not hear her say the thing she is charged with saying.

Cross-examined. I thought it a very good lecture; paid a dollar or so for my ticket; think I got the worth of my money; Mrs. O'Hare asked me to come to the trial and she would pay my expenses.

Mrs. M. A. Johnson. My husband is a farmer in Bowman County; I heard the lecture. She said, "Don't quote me as saying that I object to enlistment, because I do not. If any young man feels it his duty to go, let him go and God bless him." She said his blood might

enrich the soil of France and perhaps it might do that. She didn't say it would. She just put it as a question. She said at the beginning of the European war the European women were asked by the church or by the State to give themselves to the soldiers regardless of marriage so the soldiers could breed before they died to increase the birth rate as well as the death rate and the women were put on the same basis as a brood sow on a Montana stock farm.

Mr. Hildreth. There were expressions used in that lecture that evening that disgusted you, were there not? Why, no, not really. You don't think there was anything said there that evening that grated on the ear of a sensitive lady? Why, no. You didn't object to anything she had said? No, I did not. Were you in full accord with the sentiments that she uttered there that evening in that lecture? Yes. All of it? Yes, sir; I was.

John Williams. Am a farmer in Bowman County; my wife and I attended the lecture.

Mr. Lovell. Did she ridicule or condemn the boys of this country who enlisted as soldiers? None whatever. Did she speak of them at any time as the scum of the country? I should say not. Did she use the word "scum" at all? Not to my knowledge. If you remember Mr. Williams, will you state what Mrs. O'Hare said in substance with regard to comparing women with brood sows? What she stated was at the time the European war broke out that the European women were demanded by the government and

by their clergymen and the priests to breed—have the soldiers married or breed before they died and such a condition she said, brings womanhood down to the same level of brood sows on a Montana farm. Do you remember hearing her say in substance that if any young man wants to enlist in the army of the United States, let him go and God bless him? Yes, sir. I will ask you to state whether she made that statement emphatic by saying either before or after it, "Do not misunderstand me and do not misquote me." She said, "Do not misunderstand me because I have no objection to any boys that want to enlist; if they want to go, God bless them, let them go. Their blood possibly will enrich the soil of France." She brought in the Socialist platform, told what they stood for, and what they had been accused of by other political parties. They were accused of Socialists bringing the country to war, and instead of the Socialists doing it the other parties brought it. Then she told about conditions in European countries as she had traveled through them, and especially of Ireland, Belgium and other foreign countries.

Gross-examined. I believe in what she said and sympathize with her now. She said she was in a position to realize how a mother felt in regard to a boy—that is, to her boy. She had raised three or four sons, and she could realize how a mother felt. She said they were too young to go into the army. I applauded a good deal the lecture. We all approved of it, but when the *Pioneer* came out the

next week and made the statement that she was charged with those two indictments, everybody knew they were false and that is how particularly we noticed that. We all recollected what she said, and hundreds of them today——

The COURT. Witness, speak for yourself.

Mr. Hildreth. Have you talked with the 125 people that were there? No. You are real favorable to her, are you not? To be truthful about it, aren't you? I want her given fair play. You are the second witness that has used the expression "fair play." Have you any reason to suppose that she would not receive fair play in this court? Not in this court, no, sir. I suppose it has also occurred to you that the Government of the United States might want fair play, too, hasn't it? Yes, sir. And I presume it has also occurred to you that in these trying times people ought to do a little less talking than they have ever done before, hasn't it? That depends, of course. Depends upon the point of view of the individual or the interests of this great country of ours? We ought to talk more, and have everybody co-operate and win this war.

C. E. Joice. Live in Bowman County; have been County Treasurer; was at the lecture but did not hear much, as I was standing by an auto outside and the trains passing made a lot of noise.

Mrs. E. K. Couet. Live in Bowman; my husband is a barber; was at the lecture; did not hear her use the language charged; so far as I can remember

she was referring to the war in Europe and went on to tell about how women were being degraded by having to give themselves to the soldiers, so they could breed before they died. That is the way I understood it. She said that the women were being carried down, put down with the brood sows; did not hear her use the word scum.

Cross-examined. We used to take the Ripsaw; I practically agreed with all she said; I applauded it; the only young man I saw there was my brother; I did not know that my husband had been reported to the Federal authorities as a man who was having congregated in his shop from time to time individuals that were opposing the measures of the Government with reference to recruiting. I never knew my husband to say anything.

Mr. Hildreth. I understood you to say that your husband was a barber? Yes, sir.

December 7.

Mrs. Totten (recalled). Had no acquaintance with the defendant prior to her coming to Bowman in July; had not read any of her writings. I am postmistress at Bowman; I do not belong to the faction that the witnesses for the Government do; I belong to my husband's.

Albert Anderson. Am a farmer in Bowman County; have a brother in the army in France; was at the O'Hare lecture; did not hear her say those things in the indictment; did not hear her use the word scum; she was explaining all the things that socialism was accused of, that they were not guilty of—a lot of

things. I can't remember the speech very well at this time, as I had paid no attention to it; never thought it would be brought up. As I remember it she was telling about the churches destroying Christianity, and she went on and told what the churches and priests were doing over there, that they were leaving the women to give themselves to the soldiers whether they were married or not for the purpose of—in other words—breed before they died, she said, and that degraded the women there to a level with brood sows on a Montana farm. She said that we mustn't misquote her, she is not opposing enlistment, but if they wanted to go let them go and God bless them; that their blood would fertilize the soil of France. Probably that is the best use for it.

Cross-examined. I liked the lecture; applauded some of the points; don't remember now which ones.

Mrs. John Williams. My husband is a farmer in Bowman County; we attended the lecture together; did not here her make the two statements charged in the indictment; remember her saying, "Do not misunderstand me or misquote me. If any young man wants to enlist in the service of the United States, let him go, and God bless him."

Cross-examined. I liked the lecture, and mostly agreed with her; applauded her more than once; think there were young men and women there. She said the boys' blood might be a benefit or might fertilize the soil of France.

Mr. Hildreth. Being the wife of a farmer, you knew what that

meant, I suppose? Well, the way she said it appealed to me all right. And, of course, you felt that evening you would not want any friend of yours to go over to France and fertilize the soil, would you? Not unless it was necessary. And you didn't think it necessary, did you? No, I can't say that I did think it was necessary. You don't think so now either, do you? That it is necessary for the boys to go and fertilize the soil of France. Yes, I think it is necessary now. You think it is necessary now. Changed your mind, did you, after the lecture, or did you have that in your mind all the while, that it was necessary for our young men to go over there and fertilize the soil of France? I do. She was referring to the degradation of the European women, and she said she thought when the church and the preachers and the priests, and all, would tell the men to breed before they died it brought the womanhood of European countries down to the same level as brood sows. Was it your understanding if the American soldiers went over there, or if the mothers, the American mothers in this country, should breed sons

to go to the army that they were placed on the same level? No, sir. You thought that the American mother was lifted above that level? I did. Did you get that idea from her lecture? Well, I don't know that it was just from her lecture. Did she state that the German soldiers were perpetrating these outrages upon German women, and that the German authorities were requiring the women of that country to submit to soldiers to breed before they died? I don't think she mentioned Germany more than others. She said the European women.

George A. Totten. Live in Bowman; know the people there well; was engaged in July with my son in publishing the *Bowman Citizen*, a weekly. All the witnesses for the Government belong to a different political faction from that of my brother, the judge, and his wife; the former belong to the faction that has been fighting President Wilson.

The COURT. That answer must be stricken out.

Mr. Totten. I am now president of the Northwestern Press Bureau; also a member of the State Board of Regents.

THE SPEECHES TO THE JURY.

Mr. Lovell argued to the jury that the evidence did not sustain the charge; that the witnesses for the Government were prejudiced; that the prosecution was the outcome of a political quarrel; and that the great preponderance of the evidence showed that the defendant did not use the language attributed to her.

Mr. Hildreth. Gentlemen of the jury: The Congress of the

United States declared war against Germany on the 6th day of April, 1917. The purposes of that war are known to all men. It is to settle the great question as to whether democracy shall rule the world or autocracy. Our soldiers are now crossing the seas. Back of the men who go into the line of entrenchments to do or die must rest the great reserve forces of the Nation.

Our Government has called to the colors under the draft act young men between the ages of 21 and 31 years. The man power of the Nation not only is involved, the resources of the Nation are not only involved, but greater than all of these elements of national strength is the spirit of our people. Whatever tends to destroy the spirit of the people, the patriotism of the people, to lessen it here at home while our troops are fighting the battles of the Nation in Europe, lessens our strength as a Nation, minimizes the patriotism of our people, and contributes in no small degree to strengthening the armies of the Central Powers.

One of the methods that have been used in the past in the wars of the Republic to injure the patriotism of the people has been the abuse of free speech. In every war we have been engaged in we have been confronted with the propagandist, the agitator, and the corruptionist. These forces have made it difficult for us to win battles, have prolonged wars, injured the unity of the Nation and been destructive of complete success on the battle field. It was true of the Revolutionary War, the War of 1812, the Mexican War, and of the great Rebellion; and it is true today that in this country, where we have a written Constitution, trial by jury, freedom of the press, and liberty of speech, we are met with a hostility on our own shores far more dangerous than the guns of our European foes.

This great evil was known to all men. Therefore Congress, on the 15th day of June, 1917, passed this act, and the defendant is charged in this indictment with having violated that act.

She went to Bowman and before an audience of from 100

to 150 people made a speech which, in some respects, has no parallel in the English language. She said: "Any person who enlists in the army of the United States of America will be used for fertilizer, and that is all that he is good for; and the women of the United States are nothing more nor less than brood sows to raise children to get into the army and be made into fertilizer." Search the annals of history and you will find no parallel in any country in the world. It was a direct blow at the spirit of the people, at the patriotism of the people. It was made intentionally and for the purpose charged. It was made to willfully obstruct the enlistment service of the United States, to the injury of the service of the United States, and to obstruct the recruiting service of the United States.

There can be little dispute about the fact that this defendant used that language. She practically admits that she used it. She claims, however, that she was delivering a lecture on Socialism, and that as a part of that lecture this language, or some of it, was used.

What was the purpose of this defendant? Why was it necessary for her to warn the women at that meeting that if they raised children to go into the army they were no better than brood sows on one of these western farms?

On the witness stand she said that her statement in her lecture was that women paid the extreme sacrifice in war—the lives of their sons—and that we women who bear the sons wanted to know—we had a right to ask and to know and to discuss the objects for which all wars were waged; to know whether it was really a war for democracy or whether it was to defend the Morgan investments. Then, when she was asked the question if she believed that the United States Government in good faith is in this war for the purpose of protecting the institutions of democracy in this country, she answered, "I believe that President Wilson is in perfectly good faith." And then she admitted that she believed that Congress was in good faith in declaring war.

This lecture, this speech, stirred this Commonwealth as no

other speech. Why? Because this woman had gone upon the rostrum and, before the people of a great country, had instilled in their hearts and minds that this was Morgan's war and not the war of the United States; that this was a war to protect the investments of financiers and not the democracy of the world; that this was a war that was brought about by moneyed interests; that this was a war not intended to break down the autocracy of Europe, but to build up the moneyed interests of the country; that this war was unjust and was being waged for that purpose and that alone, when she knew that the United States had suffered injury after injury at the hands of the German Government, when she knew that its ships that had a right to sail upon the seas had been sunk and the bodies of thousands of men, women, and children consigned to a watery grave under circumstances of the greatest atrocity and in violation of every principle of the laws of nations and of humanity. And yet she was telling the people that this was a war not in the defense of the American people on the sea and on the land, but that it was a war for the benefit of the moneyed interests of the country. False and pernicious doctrine! A doctrine that, if instilled in the minds of the people of this country, would prevent us from raising armies and navies and would be more potential in behalf of the Central Powers than the soldiers that are across the seas to fight the battles of the Republic. That was her attitude; that was her position; and that is her position here today. She rather justifies her position. She declares that it was a war in behalf of special interests, and not one for the cause of the people of the earth.

Gentlemen of the jury, we are not concerned with the politics of this defendant. We are indifferent as to whether she is a Socialist, a Democrat, or a Republican. But we are not indifferent to her violation of this statute which forbade her efforts upon the rostrum to carry out the evil intentions which this statute was aimed to prevent.

Does she believe that a speech of that character was intended to prove her loyalty to the Government, to the coun-

try where she lived, where she had a home? No. She was speaking in behalf of that dangerous seditious system which, if permitted to go on and on under the guise of freedom of speech, would make it difficult for this Republic to be successful in this war. Her speech was not the speech of a lover of her country. Her speech was the speech of one who was against its institutions, against its flag, and against its history. Not one word did she say in that speech in favor of her country. She did not rejoice that the Stars and Stripes waved over every schoolhouse in this land; that this Republic had been born amidst the throes of a great struggle to crush the imperialistic policies of Great Britain; that it had survived through more than a century and a quarter and was known to all men as the best and freest government on the face of the earth.

What are the people of France looking at today? Not at the cross of St. Andrew and St. George of old England. No; they are looking for the Stars and Stripes—that flag which is the hope of the world.

Gentlemen of the jury, this cause is one of the most important that has ever been tried in the United States. The defendant made her speech on the 17th of July, 1917. She has repeated that speech in many places throughout this Commonwealth. Here in this State, where its men and women have been taught to love the land of their adoption, where men and women have been taught that under our system of free schools, universities, and where a million church spires point to heaven, she would instill in the minds of the young, not the patriotism of the fathers of the Republic but the zeal of those who would destroy this Government, destroy its institutions, and drag this flag in the dust of Socialism.

Take the case. Render such a verdict that when the hand that shall write it is traceless in the grave it shall live the embodiment of the hope of a free people and a monument to the stability of our institutions.

THE CHARGE OF THE COURT.

JUDGE WADE. Gentlemen of the jury, this case has nothing to do with the Tottens, nor the views held by them. There is no evidence that Mrs. Totten has ever been appointed post-mistress by Wilson or that she stands with Wilson or against Wilson. Get those things out of your mind. It does not make any difference how many men have violated this law and have not been prosecuted. Get that out of your mind. It does not make any difference what has been said in Congress by certain parties. Get that out of your mind. Let us all hope that persons who have violated this law or any other law will receive proper punishment ultimately.

I do not want you, from anything that I may say, to even infer that I have any opinion as to how this case ought to be decided, because that is not my duty, nor is it my power. You have the sole power in that field and you will give it no consideration if I should express my opinion. My function is to tell you what the law is. You are bound by what I say the law is. I am bound by what you say the facts are. In this connection, gentlemen, it is important for us to remember that we have absolutely nothing to do with the question as to whether it is a good law or a bad law, a just law or an unjust law. All we have to do is to try to find out whether men violate it. This Republic is a government of majorities, as every republic must be. The majority of the people determine the policy of the government. The majority may not always be right, but the only way you can have a republic is that the minority shall yield for the time being to what the majority says the law shall be. We take the position in this country that we would rather be bound and governed by a majority that may be sometimes wrong than to be bound by the will of a monarch who is usually wrong.

The bringing of an indictment or a person before the court for trial is no evidence whatsoever of guilt. It is a medium by which persons are brought before the court charged with an offense. By this indictment the people of North Dakota,

speaking through the grand jury, simply, for the purpose of bringing her to trial, charged this woman with committing an offense against the laws of the United States, and the offense charged in this indictment is that at a place up here called Bowman, in the county of Bowman, this defendant, Kate Richards O'Hare, did willfully, unlawfully, and feloniously, at a public meeting held in a hall in the city of Bowman, in the said county of Bowman and State of North Dakota, in a public speech made by her in the presence of 125 people state, in substance, that any person who enlisted in the army of the United States of America for service in France would be used for fertilizer and that is all that he was good for, and that the women of the United States were nothing more nor less than brood sows to raise children to get into the army and be made into fertilizer. That such statement so made was made with the intention of willfully obstructing the enlistment service of the United States, to the injury of the service of the United States. And in another count the same language is charged, it being stated that her intention was to interfere with the recruiting service of the United States. So, you see, the charge is that she made a speech in which she said certain things with a certain intent and purpose. Now, all you gentlemen have to determine is whether that is true or not.

And in this connection something has been properly said with reference to free speech in this country. I hope there may be no misunderstanding upon that point by anyone. The Constitution of the United States and the Constitution of North Dakota both guarantee rights of free speech. But under these constitutions it has always been the law that every person will be held liable for the abuse of that right. This case does not involve any restraint upon the physical act of speaking and saying things. It simply charges that in the exercise of the constitutional right of free speech she abused that right by violating a law passed by the Congress of the United States. The right of free speech never protected anybody in abusing that right by violating a law, as

you can readily recall, because under your own observation you probably have seen men arrested for causing damages to a neighbor by libel or sued for damages for oral slander.

Bear in mind that it does not make any difference in a criminal case whether a man on trial knew about the law or not. The whole process of government in any country must proceed upon the theory that every man understands the law; because if a man should steal your horse or break into your home or kill your family and could defend himself upon the theory that he did not know it was a violation of the law, it would result in a strange perversion of justice. This woman is not charged with an intent to violate the law. She is charged with doing things with an intent to have a certain effect which the law says shall be punished. The intent relates to a purpose that she has in saying things and is utterly oblivious as to whether she had in her mind a law she was trying to violate or not.

Now, in order to understand this law and appreciate its obligation you have a right to take into consideration the things of general knowledge that the world knows, that you know—that this Nation has been drawn into this awful world conflict and that we are at war since April 6, 1917. You have a right to take into consideration the general purpose and feeling on the part of the great majority of the American people that this war must be won; that no other result would be tolerated. You have a right to take into consideration the general knowledge which you must have, as everyone else, that there is only one way to win the war and that is to have soldiers, and the only way to get men for soldiers is either by voluntary enlistment or by conscription. The evidence shows, and your own knowledge brings you to the fact, that at and prior to the time this speech was made the Government was exercising its power and its duty to get men to serve as soldiers, and was then recruiting, as the expression is—asking men to enlist voluntarily as well as at that time preparing methods of conscription. It appears from the evidence that this effort at getting enlistment was being made

at Bowman, in this county. Now, of course, the Government, having this obligation and this duty and responsibility, had the right to protect itself against those who would interfere with the performance of that function, not against the many but against the few who might assume that they knew more than the other 90,000,000 people and who might assume to obstruct, so far as they might, this duty on the part of the Government. The Government in this country speaks only through Congress, and Congress, representing all the people of the United States, on June 15, 1917, passed a law which has been referred to as the Espionage law, having a great many restrictions upon acts and conduct which are never exercised in times of peace but which Congress deemed advisable in a time of war. And one of these restrictions is that "whoever, when the United States is at war, shall willfully cause, or attempt to cause, insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished." Now, it is the latter of those two clauses which the indictment charges here that the defendant violated. "Whoever shall willfully obstruct the recruiting or enlistment service of the United States . . . shall be punished." That is the law of this country. You will observe that it does not say how the act shall be done, but any way that a person obstructs, willfully, the recruiting or enlistment service. That is the thing the grand jury charged against her and specified the things which they said she did.

I have tried to get before your mind something of the legal situation at the time of the acts charged. The only duty you have to perform is to determine whether or not the things charged here by the Government are true or not. The defendant came in at the proper time and pleaded not guilty to this indictment. A plea of not guilty is a denial of all the statements made in the indictment, and this denial places upon the Government the burden of proving the charges

made or such portion of them as constitute the offense charged. The defendant does not have to prove that she is innocent. The Government must prove that she is guilty. The law assumes that every person put upon trial for any offense is innocent, and that presumption continues through the trial until evidence is brought before the jury of such weight as to satisfy the minds of the jury beyond a reasonable doubt that the person charged is guilty; and, unless the evidence so shows, the defendant is entitled to an acquittal. I want you to enter upon the consideration of this simple question utterly without any sympathy for anybody or any feeling toward anyone, without any recognition of any political controversies, or anything of that kind. We are all so really sensitive, we have to guard ourselves against those things as much as possible. If there is any place we need cold-blooded, square, honest judgment, it is in the jury box.

Now, what is necessary to be proven by the Government here? First, that this defendant said the words stated in this indictment or those in substance or meaning, words that would convey those ideas expressed to the minds of the hearers. Words, you understand, are merely the medium of expressing our ideas or sometimes concealing them. It must appear here by the evidence beyond a reasonable doubt that the defendant used these words or those of the same substance and meaning before that audience or else she is entitled to an acquittal. When I say beyond a reasonable doubt these words "reasonable doubt" mean just exactly what they express—a doubt which is reasonable, not a doubt which we might manufacture or conjure up, so to speak, to sort of justify an acquittal or a conviction. No, it means this: To take all the evidence, consider it fairly and honestly, and calmly in the light of your own experience in the world, size it up, so to speak, and, if upon such consideration, your mind wavers and oscillates between guilt and innocence, if you cannot just make up your mind that the defendant is guilty then you have a reasonable doubt within the meaning of this rule. But if in the light of all the evidence you are satisfied to that degree of certainty upon which you would act in the important affairs of life—bearing

in mind the fact that it is very hard to establish any fact in this world absolutely and certainly—but if you are satisfied, as I say, to that degree of certainty upon which you would act in the graver, more important affairs of life, in your own problems of life, that the person is guilty, then it is your duty to convict. But even if you found those words to be spoken, you must still, before you can convict, determine the question as to whether or not they were willful; that is, that they were intentionally made, that they were made with a purpose. And you must further find that the natural and ordinary result of the language used by her, would be to interfere with the enlistment or recruiting service of the United States. Here you have to take into consideration what are matters of common knowledge, that men must go from home and fathers and mothers must make the sacrifice; that men who enlist are often influenced more or less by the wishes of their parents and by their view of the conditions that they are entering; take all those things into consideration; then take the language used, if you find it was used as heretofore instructed, and determine whether or not her purpose and intent was to interfere with those men whose minds might be guiding them to enlist or to interfere with those who might have influence or domination over them or control over them—in other words, from a practical standpoint whether or not it would interfere naturally with the number of enlistments. It is not necessary, of course, and not practicable that the Government should show that some particular person was induced not to enlist by reason of the things charged to have been said. It is sufficient if the things said were said with that purpose, and that they were in their nature such as ordinarily would bring about that result. Then the offense is complete.

How are we going to find out the intent of a person? It is one of the hard things in the trial of cases, yet we have it every day. You cannot go right down in their hearts, and yet you have to find out. The only way you can do it is to judge by the acts and conduct of the person and the words used. What for—that is the question. What for? If she used the words charged, or those in substance, what was the purpose,

what did she have in her heart that she was trying to express to those people? If she did not have that intent which is charged of obstruction, she is not guilty. But if she did say those words or those in substance, with the intent, and if the natural and probable consequences of the words used there as described in the indictment were such as to naturally bring about those results, she is guilty. Other parts of her speech were admitted in the evidence. All of the things she said there that night, and the manner in which they were said, may be taken into consideration on the question as to what her intent and purpose was and what the natural effect was of what she did utter, if she did utter the words charged.

Here it is where the hard part of it begins. Here are witnesses in this case; one person swearing positively one way and one person swearing positively the other way. How are you going to solve it? Well, you will have to do so as the law expresses it, you have got to weigh the evidence. That means you have got to sift it out and determine what credence or faith you will place in the testimony of any witness. That is what the jury is for. You are going to weigh it in court just exactly as you would in your business or in the street if you were dealing with some matter involving truth or falsity. The first thing you would do there and the first thing the law expects you to do here is to look into the interest of the witness who testifies, because you know human nature is so made that persons who are interested in having a certain thing true sometimes will not tell the truth about it. Also we are all inclined to lean toward our own view of things, you know, and our memory of a past transaction is often colored by what we wish the fact to be.

So take into consideration these witnesses on both sides. What interest did they have, any of them, in telling a falsehood, or what interest did they have which would naturally color their testimony. This applies to the defendant upon the witness stand testifying in her own behalf; and it applies equally to every witness for the Government and for the defendant. Now, an interest in a case is not always financial.

That is the reason why I permitted the defendant to show that there were some political factions up there. I tried to keep out the merits of these factions. I realized that if we undertook to try out who was right in the factions and who was supporting the President, we should be here for weeks. But I did permit them to prove there were certain factions up there to which certain persons belonged simply that you would be able to weigh the evidence—because sometimes persons are influenced by their associates and their wishes. So take all these things into consideration and then take into consideration the reasonableness of the stories told; how probable they were; what is the likelihood of such stories being true; a man does not have to believe everything another man says if it is contrary to human probability. Take into consideration the appearance of the witnesses and their standing—not because they hold some public office but their apparent standing in the community as a people. Take their appearance here on the stand with reference to candor or otherwise. Take all those things into consideration and from it all determine just where the truth lies in this case. That is all you have to do. Did this woman make those statements as charged? It is an important case, but its importance must not allow you or lead you to lean one way or the other. The truth is the truth no matter what the controversy may be, no matter who the individual is. In the courts every man stands alike whether he is a Socialist or belongs to some other political party; whether he is rich or poor. You must weigh the evidence and get at the truth. When you get at the truth it is over so far as you are concerned; and, from observing your interest in the case from the beginning and in the testimony, I am satisfied you will be able to consider all this evidence and come to a just conclusion and bring in a verdict founded on that.

Mr. Lovell. On behalf of the defendant, if your Honor please, I desire to except to that portion of the charge of the court to the jury in substance as follows: "It has not anything to do with the Totten's inasmuch as the evidence of the Totten's was introduced and the evidence relating to them was introduced under the permission

of the court as bearing upon the credibility and interest of the witnesses."

I desire further to except to that portion of the court's charge to the jury as follows: "There is no evidence that his wife has been appointed as postmistress by Wilson or anybody else." It being contended by the defendant it is a fact that the postmistress is an appointee either of the present President of the United States or of his predecessor.

I desire further to except to that portion of the court's charge to the jury in substance as follows: "Let us all hope that anybody who violates this law or any other law will be convicted," it being contended by the defendant that this is an expression prejudicial to the defendant on the ground that the corollary of that proposition is not expressed to the jury, namely, that we hope that anybody who is innocent will be acquitted.

I desire to except to that portion of the court's charge to the jury in substance that "this woman is not charged with the intent to violate a law," it being contended on behalf of the defendant that is all she is charged with.

I desire to except to that portion of the court's charge to the jury wherein the Court quotes to the jury that portion of section 3, title 1 of the act of June 1, 1917, in substance as follows: "Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States" inasmuch as the reading of that portion of the charge may confuse the mind of the jury into thinking that is what the defendant is charged with in this case, it being the fact that the defendant is charged with a wholly separate and different crime.

I desire to except to that portion of the charge of the court to the jury as follows in substance: "I want you to enter upon the performance of your duty without considering any political situation or conditions"—it being contended by the defendant that the consideration of the political conditions which were permitted to be introduced in evidence by the court has a bearing upon the interest and credibility of the witnesses.

I desire to except to that portion of the charge of the court to the jury defining reasonable doubt.

I desire to except to that portion of the charge of the court to the jury in substance: "It is not necessary that the Government should show any person was influenced by the speech."

I desire to except to that portion of the charge of the court to the jury in substance: "All of the words uttered by her might be taken into consideration for the purpose of determining the intent with which the words were spoken."

I desire to except to that portion of the charge to the jury in substance as follows: "In determining the truth take into consideration the appearance of the witnesses, not because they hold some public office." That phrase is itself a reflection upon the credibility of some of the witnesses for the defendant.

JUDGE WADE. The jury, of course, will understand, I think, without any question, that when I said: "This is not a controversy over the Totten's," I referred only to problems of the Totten's or any of their rights of offices or anything of that kind. I have already instructed the jury that this faction so far as the evidence is concerned, may be taken into consideration in weighing the evidence. But it has not anything to do with this case except as it affects the credibility of the witnesses. The same applies also to the matter of holding public offices—for instance, the matter of regency or anything of that kind. It has not any thing to do with this case. I tried to keep it out, except in so far as I have already indicated. The fact that these persons, witnesses on one side or the other were on one side of a faction or a political party or another was permitted to be shown just for the purpose I have indicated.

I instruct the jury that there is not any fair inference that Mrs. Totten was appointed postmistress by anybody, nor had it anything to do with this case except as her position there affects her credibility as a witness.

I think I made it plain that in expressing the hope that all persons who violated the law should be convicted, that I also hoped every person who did not violate a law should be acquitted. I think I made that plain. The Government would be just as much interested in one as in the other. You may retire, gentlemen.

THE VERDICT AND SENTENCE.

The *Jury* retired, and after a short time, returned to the court room. The foreman handed the following written verdict to the clerk: "We, the jury, find the defendant *guilty* as charged in the indictment.—A. L. Peart, Foreman."

December 14.

Mr. Hildreth. If the court please this being the hour and day fixed for passing judgment in this case, the Government now moves for judgment.

Mr. Lovell. As I have already intimated to court and counsel, I desire to present two motions: First, for a new trial and, second, in arrest of judgment. My reasons are that the verdict is contrary

to the weight of the evidence; that the indictment does not charge more than an intent to violate the statute, while an actual obstruction is required¹; that the court excluded competent evidence offered by the defendant²; and that the court improperly instructed the jury.³

JUDGE WADE. The motions are denied. Is there anything to be said now why sentence should not be imposed upon this defendant?

Mrs. O'Hare. Yes, your Honor: I was taught in high school that law was pure logic. Abstract law may be pure logic but the application of the law of testimony in this case seems to have gone far afield from logic. As your Honor knows, I am a professional

¹ In affirming the conviction the Court of Appeals said on this point:

"It is asserted that to 'obstruct' the recruiting or enlistment service some physical force, obstacle or impediment must be employed; that mere speech is not sufficient. Doubtless in some relations the word has that meaning but manifestly it is not so limited in the statute before us. In the very nature of the evil sought to be avoided there could be no more potent means of obstructing or even defeating a country in raising its forces for war, especially in a time of voluntary enlistment than a campaign of abuse calculated to inflame the ignorant or lawless against the operations of their duly constituted government and to incite or encourage them to resistance. In the sense of the statute to obstruct means also to hinder, impede, retard or embarrass, and any efficient means to that end is within the condemnation. If counsel were right in this the picketing of recruiting stations by orators and lecturers would be admissible if they stopped short of physical violence."

² As to this the Court of Appeals said: "Complaint is made of the exclusion of some evidence of a local political controversy upon which witnesses for the Government and for the defense were divided. The defendant was not a party to it, and it did not affect her except as it bore upon the feeling of the witnesses toward each other, and therefore rather remotely upon their credibility; and for that limited purpose sufficient of the evidence was admitted by the trial court."

³ As to this the Court of Appeals said: "It is urged that the court erred in refusing a requested instruction that the defendant could not be convicted unless she used the language set forth in the indictment, literally or in substance. The full effect of the instruction was given in the general charge. The court was not required to use the precise words of the counsel. Finally it is said that the court erred in instructing the jury that it was not necessary that the Government show that some particular person was induced not to enlist. The instruction was right. The phrase 'recruiting or enlistment service' as employed in the statute signifies more than the mere induction into service of identified individuals. It means the particular governmental function or establishment as a whole and comprises the means, agencies and instrumentalities which it adopts

woman, following the profession of delivering lectures whereby I hope to induce my hearers to study the philosophy of socialism. In the regular course of my profession and work I delivered during this year lectures all over the United States—in North Carolina when the draft riots were at their height; in Arizona two or three days following the deportations from Bisbee, and on the day when the strike vote was taken, when excitement ran high and passions were having their sway; in San Francisco during the Mooney case, and in Portland, Idaho, and the Northwestern lumber regions during the great I. W. W. excitement; and at all of these lectures conditions were as tense as conditions could be. The men who were in the employ of the United States in the Department of Justice were present at my meetings. These men were trained, highly efficient, and highly paid, detectors of crime and criminals. In all these months, when my lecture was under the scrutiny of this kind of men, there was no suggestion at any time that there was anything in it that was objectionable, treasonable or seditious. It was the custom of my meetings to send complimentary tickets to the district attorney and the marshal and deputy marshals of the district in order that they might hear the lecture. And then in the course of the trip I landed at Bowman—a little, sordid, wind-blown, sun-blistered, frost-scarred town on the plains of Western Dakota. There was nothing unusual in my visit to Bowman, except the fact that it was unusual to make a town of this size. The reason I did was because there was one man whose loyalty and faithfulness and unselfish service to the cause to which I had given my life wanted me to come, and I felt he had a right to demand my services. I delivered my lecture there just as I had delivered it many, many times before. There was nothing in the audience that was unusual except the fact that it was a small audience—a solid, substantial, stolid type of farmer crowd. There was not the great enthusiasm that had prevailed at many of my meetings. There was nothing to stir me or arouse me or cause me to make a more impassioned appeal than usual. There was nothing at all in that little sordid, wind-blown town, that commonplace audience, that should have for a moment overbalanced my reason and judgment and common sense and have caused me to have been suddenly smitten with hydrophobia of sedition. But I found there were peculiar conditions existing at Bowman, and they are common to the whole state of North Dakota. In this State in the last year and a half the greatest

or upon which it relies to accomplish its object. If language and the time and circumstances of its use are such as would necessarily result in obstructing the recruiting or enlistment service as so defined, the result will be presumed to have followed. That is the case here. Moreover, there was substantial proof that the defendant embraced the occasion, and that her language set forth harmonized with the trend of her address and accorded with her design."

and most revolutionary social phenomena that has occurred since the foundation of this Government, has taken place. The story is one that is so well known that I need spend little time on it. Here to these wind-blown, frost-scarred plains came men hard of face and feature and muscle who subdued this desert and made it bloom and produce the bread to feed the world; and these men, toiling in their desperate struggle with adverse conditions and with nature, gradually had it forced on their minds that in some way they were not receiving a just return for the labor expended; that after their wheat was raised and garnered in the processes of marketing, men who toiled not and suffered none of the hardships of production were robbing them of the product of their labor. They felt that the politicians, the men who held the offices in the State, the men they elected to office, were not serving them, but they were using their offices and power to assist in the robbery and exploitation of the farmers of this State. So they appealed to the legislature and there came that marvelous thing that had such a wonderful effect in this State—an insult, a sneer from the lips of the politicians who believed themselves firm and secure in power, and that sneer, that insult, that told the farmers to go home and slop the hogs while the politicians ran the State, had the effect of cementing the farmers in this State into a great revolutionary organization, and that organization went out and swept the whole State and carried out of power the men who had been in power and put in power the men chosen by the farmers of this State. This had occurred in Bowman County as it had all over the State of North Dakota. The old order had been deposed. The new order had been enforced, and naturally, as always follows, the appointive offices that are called the spoils of political warfare were taken from the adherents of the old order and given to the adherents of the new order. So far as I can judge, the fattest, juiciest, most desirable plum in Bowman county was the postoffice. This was taken from the man that had held it and given to the wife of the leader of the new order. This naturally created business hatred and venom in such marked degree as I have never seen in all my experience. It chanced that it was the adherents of the new order that attended my lecture, paid for the tickets, appreciated it, approved it and applauded it, as they stated on the stand. And among the adherents of the new order that attended was the postmistress, and then the real thing in this case came out. And that was the contest over the postoffice. There was a certain hungry office seeker in Bowman. He was the principal witness for the prosecution. He made the statement on the stand that he was a farmer, but he has never tilled the soil. He has always been a political hanger-on, a camp follower of the old political order. Separated from any political job he became lean and hungry and looked with a hungry eye on the postoffice; the deposed boss of the old order was perfectly willing that the hungry office seeker might have the postoffice if only the present incumbent could be eliminated, and when the postmistress attended the lecture and the next

day invited me to her home as her guest, there grew up in the minds of the deposed boss and the hungry office seeker the hope that I might be made the lever whereby the postmistress could be separated from her job and the hungry office seeker find an opportunity to live without labor. So telegraphic communications were established with Senator McCumber. There was no charge that I should be arrested for sedition or treason, but the demand was made by the deposed political boss of Bowman County that the postmistress should be removed for having entertained me. He appeared before the district attorney and made the demand that the postmistress be removed, and he was told that this was impossible; that the postmistress had committed no crime; if any one was the criminal it must be I; and so, on the testimony of the hungry office seeker and a few of the adherents of the old order this indictment was returned—the indictment that does not charge me with a crime, the indictment that in no place states that I ever committed a crime; the indictment that merely says that I had an intent to commit a crime. And your Honor, it seems to me one of those strange grotesque things that can only be the outgrowth of this hysteria that is sweeping over the world today that a judge on the bench and a jury in the box and a prosecuting attorney should attempt to usurp the prerogatives of God Almighty and look down into the heart of a human being and decide what motives slumber there. There is no charge that if my intent or my motive was criminal that that intent or motive ever was put into action—only the charge that in my heart there was an intent, and on that strange charge of an intent so securely buried in a human heart that no result and no effect came from it, I went to trial.

I am not going to spend any of your valuable time rehearsing the trial except to say that to my mind it is absolutely impossible that under any legal rule or thought a human being can be tried for a thing that he never did and there is no charge that he ever did, but only that he might have an intention of doing. But, your Honor, all through this trial, all through the questions of the district attorney, all through his appeal to the jury, as the ever-recurring motive of this little drama of life there ran the charge of a crime of which I was accused. And this crime is not a new one. It is as old as the human race. It is not peculiar to me. It is universal as life itself. This crime that was charged by inference in the trial was the same crime, the same charge that was brought against the first slave rebellion against the first serf revolt. It was the charge that was brought against Moses and Spartacus, Watt Tyler and Cromwell, George Washington and Patrick Henry, William Lloyd Garrison and Wendell Phillips, and it was the same crime that was charged against Jesus of Nazareth when he stood at the judgment bar of Pontius Pilate. The crime is this: "She stirred up the people." And, your Honor, if by inference I can be charged with that crime and tried for it, then your Honor, I plead guilty of that crime if it is a crime. For twenty years I have done nothing but stir up the

people. As a high school girl in the first flush of youth, I did my best to stir up the people against the corruption and debasement and debauchery and damnation that came with the liquor traffic of the United States. As a young woman I did all in my power to stir up the people to revolt against the damnation of the vice interests in this country, the interests that debased six hundred thousand women and used them to further political interests of existing political powers. I did all in my power to stir up the people, the working class of the United States to demand more of the wealth of this country. I did my best to stir them up to demand shorter hours and better pay and better conditions; and the one great motive and object of my life has been the ambition to stir up the people of the United States to demand life and life more abundant. And if this be the crime for which I was tried in this court, then, your Honor, I am guilty of that crime. But having made this statement and realizing now that the time has come when you are about to pass judgment on me, it seems to me it is meet that we should consider the things that are involved.

There is no doubt that in this hour of travail and sorrow and bloodshed and misery that is ushering in a new order there is but one thing that should occupy our minds and that is this: What at this time, at this hour of our country's peril and travail, will bring the greatest good to the greatest number of people? And this, I believe, your Honor, is the question that you are to decide. You are to decide whether at this hour it will be better for the people of the United States that I should be convicted not of a crime charged in the indictment but of having an intent in my heart that never found expression, and that I shall be sentenced to prison. If you believe, as the district attorney repeated so frequently and forcefully, that I am a dangerous woman, strong and powerful, with the ability to sway men's minds and lead them to do my bidding, if you believe that that is true and you believe the fact that I had a wrongful intent in my heart to which I never gave life or action, and that because of that intent that never matured into a crime, it is better that I should go to prison, then it is your duty to place me there where I cannot injure my country or interfere with the conduct of this war. You must consider well whether my conviction is going to have a tendency to unite the people of this country or to dis-unite them.

And, your Honor, I want to call this thing to your mind, that the man or the nation whose cause is just is thrice armed; and if the cause of this nation is just in this great war then is it necessary, in order to impress the people of the righteousness and justice of the cause to convict and sentence a woman on the charge of having an intent but never committing a crime? And you must consider also the danger of arousing hatreds and prejudices and suspicion. Your Honor, there are 100,000 people in the United States who know me personally. They have listened to my voice, looked in my face and have worked side by side with me in every great reform

movement of the last twenty years. My life has been an open book to them. They know down to this time I have given all that I am, all that I have, from my earliest girlhood, my girlhood, my young womanhood, even my motherhood. And, your Honor, no judge on earth and no ten thousand judges or ten thousand juries can ever convince these hundred thousand people who know me and have worked with me, and these millions who have read my writings, that I am a criminal, or that I have ever given anything to my country except my most unselfish devotion and service. You cannot convince the people who know me that I am dangerous to the United States Government. They are willing to admit I am dangerous to some things in the United States, and I thank God that I am. I am dangerous to the invisible government of the United States; to the special privileges of the United States; to the white-slaver and the saloonkeeper, and I thank God that at this hour I am dangerous to the war profiteers of this country who rob the people on the one hand and rob and debase the Government on the other, and then with their pockets and wallets stuffed with the blood-stained profits of war, wrap the sacred folds of the Stars and Stripes about them and shout their blatant hypocrisy to the world. You can convince the people that I am dangerous to these men; but no jury and no judge can convince them that I am a dangerous woman to the best interests of the United States; and at this hour will my conviction, my incarceration behind the bars of a prison have the tendency to cement and hold together the great mass of people in this nation, or will it create hatred and bitterness and arouse suspicion and make these people who know me and who cannot be brought to doubt me, feel that this whole case is nothing but an attempt on the part of the war profiteers to eliminate and get out of the way a woman that is dangerous to them? I do not believe that this is true. I do not believe at this point that you are the tool of the war profiteers, I do not believe it is true of the district attorney. I do not believe it is true that this case is anything but one of those weary, grotesque, fantastic things that have grown out of the war hysteria. But I say that the great mass of the people of the United States are going to have that thing burned into their souls if I go to prison. And you have learned in North Dakota what happens when the working classes have these things burned into their souls.

So, your Honor, I am not asking for clemency or mercy. I would scorn to do such a thing. To ask for clemency or for mercy would be an admission of some sense of guilt on my part, and there is absolutely none. All I am asking you to consider is the greatest good to the greatest number. What can we do to make this nation united? What are the dangers of arousing hatred and suspicion and passion and prejudice in these critical times? I am asking you, your Honor, will I be more dangerous outside, following the work I have been doing for the last six months representing the so-called Minority Wing of the Socialist party. We are counselling patience broad-

mindfulness and tolerance. I have gone about at a great sacrifice to myself and endless weariness into every corner of the United States and have said to the Socialists everywhere: "This is not a time for bitterness; this is not a time for passion or prejudice; this is a time for calm, careful, clear thinking. This is a time when we must wait as the mother waits for the pangs of travail. We cannot stop the coming of this new order that is about to be born any more than the mother can stop the coming of the new life whose time is full. And so we must be patient and tolerant and long-suffering and level-headed during this time. We must give this nation the opportunity to prove its statements that this war shall be the last of wars; that this war is being fought in order that wars may end." I do not know whether that is true or not. Your Honor, I cannot look down into the motives of men's hearts in Washington as the judge and jury looked down into the motives of my heart and read them.

Your Honor, if you decide that I can serve my country better in prison than anywhere else, I am satisfied. It may be true that "God works in a mysterious way his wonders to perform." That down in the dark, noisome, loathsome halls we call prisons there may be a bigger work for me to do than on the lecture platform. It may be that down there are the things I have sought for all my life. All my life has been devoted to taking light into dark places; to ministering to sick souls; to lifting up degraded humanity; and God knows, down there in the prisons perhaps more than any other place on earth, there is need for that kind of work. So if as it was necessary that Jesus should come down and live among men in order that he might serve them, it is necessary for me to become a convict among criminals in order that I may serve my country there, then I am perfectly willing to perform my service there. I will do it without a quiver. I will face the prison and the things that go with prison life just as calmly and as serenely as I faced court and judge and jury. I will go out of this courtroom to meet whatever you mete out to me with no bitterness in my heart, with no hate in my soul but with nothing but the greatest feeling of comradeship and friendship and appreciation for what you men have done, because I believe that you have done the thing that you thought was your duty to do. And so, if it must be that I go to prison I do not want a man who sat on the jury, I do not want the district attorney, and I do not want your Honor to go out of this room having any feeling that perhaps that in some way you have committed a wrong that you have injured me, for, your Honor, you cannot injure me, and the jury cannot injure me, and the prosecuting attorney cannot injure me. There is only one being on earth that can injure me and that is myself. And as long as I am right with my God and right with my soul you cannot if you would, injure me. You can send me to prison, but thank God you cannot send a great principle to prison; put it in a cell and turn the key on it. You can degrade my body; you can put it in stripes; you

can make me go down and live with the lowest and most degraded and contaminated on earth, and still you cannot injure me for greater men and women have done this. If the Son of God can come down and partake with publicans and sinners and confer with harlots and thieves and murderers and be uncontaminated, then, if I have his spirit I can do the same thing.

And now there is just one other thing and I am done. Your Honor, the war is on now. It is a great world tragedy. It has shaken us all to the very center of our being, that has warped our judgments and inflamed our passions and made us different creatures than we ever were before—possibly for our good, but it must end. Peace must come. And when the war ends and peace comes then will come the trial of the human race. It is no test of humanity to successfully wage a war. It does not take brains or courage or manhood to destroy. An idiot can destroy in a moment what it took a lifetime to create. Mere brute force can take a life, only God can give. So the test is not going to be the war. It is going to be the rebuilding of civilization after the war is over. When the war is done and peace comes the graves must be smoothed, the grape vines and wheat planted, the cities must be rebuilt, the ways of peace and justice and righteousness must be established. And after peace comes, your Honor, and after the war is done, then there is just one other thing that you can consider. Will I in that hour of reconstruction, can I and will I serve my country best in prison? Will that reconstruction go on better, wiser for my elimination? Or is it possible that when that hour comes and the maimed and the broken and the heartsick and the soul-oppressed soldier comes home—in that hour when the widow must be comforted and the sonless mother must be supported and the orphan must be cared for—is it not possible that in that hour, in that day of stress and trial and heartache and misery, that I, who have had twenty years of everlasting study and struggle to fit myself to deal with the downtrodden and oppressed and the heartbroken and soul-sick and weary—is it not possible that in that hour I can serve my country better at liberty to write and speak and do my work, than I can serve it incarcerated in a prison cell?

So now, your Honor, I am ready to accept judgment, knowing full well that no matter what becomes of me, no matter what becomes of you, or what your action may be, that this great world tragedy is achieving the thing to which I have given my life, and that is, it is bringing in the great co-operative United States of the world, a world built on co-operation instead of competition; a world where greed and vice and avarice have been replaced by brotherhood and justice and humanity. And, your Honor, since all my life has been given to that ideal of bringing about that new order and sharing in that time, if this war is to do that thing, then, your Honor, I can feel that I can retire, perhaps, and rest. So your Honor, if you decide at this hour that in the service of the people of this country, I should be sent to prison, then I go, knowing that

the onward march of progress will still keep on, and eventually my aim, my goal and my ideal, will be achieved. And knowing this, your Honor, I can face the court, I can face prison, I can face any sentence that you can give serene and calm and unafraid. Your Honor, I await the sentence that you see fit to pass upon me.

Mr. Hildreth. I just want to call attention as a matter of record to the statement made with reference to who appeared before the grand jury as a disappointed seeker for the postoffice, and which was the basis for this indictment. That was entirely wrong. The matter was not considered in my office from any political standpoint whatever. After a very careful and painstaking investigation in which neither the postmistress nor anyone as far as I know that was allied with the postmistress or any officer that I know of, or any person who was a seeker for that office, was concerned in the slightest degree, the matter was presented to the grand jury. It was not suddenly taken up, but on the contrary, the matter was thoroughly investigated by a grand jury of representative men of the State upon which some of the best citizens of the State, regardless of all political affiliations, men I have known in public life, found this indictment.

It has not been easy for me to present to the court and jury the situation created by that unfortunate speech at Bowman. It has become now not only a matter of great state interest but of interest to the nation; and while I have no desire to urge upon the court any severe judgment, some of the things that have been said here today evidence to my mind and I think to the mind of every impartial hearer, that whatever I said before the court and jury in summing up this case was true. The ability displayed, command of language and motive expressed, if used along other lines, would have been of the greatest possible value to this nation as an asset in the position which the Government is taking. But we find that influence used in the other direction—unfortunately so. It is true in some respects that this defendant has pointed out evils existing in the body politic, but in pointing them out she has unwittingly brought to the threshold of this nation the greatest possible danger.

Now, I might add more on this occasion; I do not believe it possible for me to say less.

JUDGE WADE. It is never a pleasant duty for me to sentence any one to prison, and it certainly is not a pleasant duty to send a woman to prison; and however careless I may be in other things in court, in the course of a trial, in all the years I have been on the bench in the State and Federal courts, I have made it a rule to try to find out who I am sending to prison, because we all make mistakes in this world at times. On the spur of the moment and under excitement, sometimes people are misled and commit offenses, and I have a hard

time to reconcile my view of things with heavy sentences in those cases. Therefore, when this case was closed, I made up my mind that I would find out before imposing sentence in this case what were the activities of this defendant.

She testified here to her loyalty, and her support of the President, and I was hoping in my heart that somewhere I would find out that after all, she was such a woman as she has here pictured herself today, and that thus a small penalty for this offense might be adequate, because I realize this is a serious business. The Nation is at war. Every sane man and woman knows that there is only one way that this war can be won, and that is by having men and money and spirit. Those three things are necessary—spirit in the men, in the service, and spirit in the men and women behind the men. And it was because of these absolute essentials that Congress enacted the Espionage law, to reach out and take hold of those who are trying to kill the spirit of the American people, in whole or in part; trying to put in their hearts hate towards this Government and towards the officials of this Government conducting the war. And realizing that this was such a grave matter, I investigated it as far as possible to find out really what character of woman this defendant is, and has been, in her work. I heard the evidence in this case. I had nothing to do with the question of whether she was guilty or innocent. The jury settled that question, and in my judgment, settled it right.

I received information from another town in North Dakota, and this information was given in the presence of counsel for the defendant that at Garrison, in her lecture there, she made the statement that mothers who reared sons to go into the army, were no better than animals on a North Dakota farm; that this war was in behalf of the capitalists, and that if we had loaned our money to Germany instead of to the allies, we would be now fighting with Germany instead of with the allies. That she had boys, but that they are not old enough to go to war, but that if they were, they would not go. That the way to stop the war was to strike, and if the laboring men of this nation would strike, the war would soon be ended. Of

course that was an *ex parte* matter. I have heard enough of testimony in my life, and I have seen enough of human nature to know that sometimes these things are stretched because of the feeling on one side or another of the question. So I thought I would go back and see what she had been doing. I wired the Postoffice Department at Washington, and I received a telegram which states:

"Party is on editorial staff of publication, Social Revolution, Saint Louis, Missouri, which has been barred from the mails for gross violation of Espionage Act, and is successor to Ripsaw. The party appears to be of the extreme type who have attempted to handicap the Government in every way in the conduct of the present war."

That was only a statement of an opinion. I tried to get copies of the Social Revolution, and have not succeeded in getting either the number for June or July. At some period during that time the Postmaster General barred this from the mails. I have the April and May numbers. In April they publish from Eugene Debs this statement:

"As we have said, the bankers are for bullets—for the fool patriots that enlist at paupers' wages to stop the bullets, while the bankers clip coupons, boost food prices, increase dividends, and pile up millions and billions for themselves. Say, Mr. Workingman, suppose you have sense enough to be as patriotic as the banker, but not a bit more so. When you see the bankers on the firing line with guns in their hands ready to stop bullets as well as start them, then it is time enough for you to be seized with the patriotic itch and have yourself shot into a crazy-quilt for their profit and glory. Don't you take a fit and rush to the front until you see them there. They own the country and if they don't set the example of fighting for it, why should you?"

This was in April, before the war was declared. Up to that time I realize that every person in this country had the right to discuss the war, express their opinions against the war, give any reasons they might have against the war. But you will find here in this statement the note which rings out from the statement of the defendant here in court this afternoon and which forms the foundation of the entire gospel of hate which she and her associates are preaching to

the American people: That the Nation is helpless, prostrate, down-trodden by a few capitalists, and that the average man has not a chance on earth; that this war is a war of capitalism; that it was brought about by capital and in the interest of capital; that 100, 200, or 300 millionaires and billionaires, if you please, in these United States dominate the souls and consciences of the other 99,000,000 American people. This will be more apparent as I proceed with her work.

I take the May number, after war was declared, and I find in an article written by Kate Richards O'Hare the following:

"Not only will the capitalists who forced the war, be compelled to pay the money price of it from their blood-stained profits, but they will be forced to socialize industry in order that the war may be carried on. Individualism run amuck can force a war, but only socialism can save the human race from suicide. We socialists have bitterly opposed our nation being dragged into the world war; we oppose it still. *We will resist conscription with every force at our command*, but since the war has been forced upon us, we will use it as a weapon by which we may wrest the means of life from the hands of the capitalist class and restore them to the workers."

This is the gospel she thinks she can help the Nation with at the present time. But that is not all. The Department of Justice furnishes me the following resolutions adopted at a meeting of the extreme wing of the Socialist Party, to which the defendant belongs, at their St. Louis convention after war was declared. The Secret Service, in sending in their report, says in a letter:

"We have been unable to secure anything specific on her that would be a violation of the Federal law in this district, but we have placed her in a class whose hearts and souls we are morally certain are for Germany against our country."

I turn to the resolutions. This defendant was chairman of the committee that brought in these resolutions. A newspaper of the city of St. Louis, in describing this convention, states:

"The Socialist Party, in a national convention at the Planters' Hotel last night, adopted resolutions proclaiming its "unalterable opposition to the war just declared by the Government of the United

States. The majority report of the committee on war and militarism containing the resolutions received 140 votes. An even more radical report by Louis Boudin, of New York, received 31 votes. The conservative minority report of John Spargo, of New York, declaring that Socialists should support the war, received only 5 votes. The vote was taken after hours of speech-making. Thomas William, of California, was hissed when he said he was an American, charged the delegates with being pro-German, and declared they did not represent the true sentiment of American Socialists. Mrs. Kate Richards O'Hare, of St. Louis, defied the Government and civil authorities. She declared that Socialists would not be molested in St. Louis for what they said because the city was against war, and the authorities were afraid to molest them."

Fine stuff for the boys and girls of the United States to be reading at this hour! But I do not take what is said in the papers as always signifying judicial fairness. I turn to the resolutions reported by the defendant at that convention. I find therein:

"The Socialist Party of the United States is unalterably opposed to the system of exploitation and class rule which is upheld and strengthened by military power and sham national patriotism. We therefore call upon the workers of all countries to refuse support to their governments in their wars. The wars of the contending national groups of capitalists are not the concern of the workers. The only struggle which would justify the workers in taking up arms is the great struggle of the working class of the world to free itself from economic exploitation and political oppression. As against the false doctrine of national patriotism we uphold the ideal of international working-class solidarity. In support of capitalism we will not willingly give a single life or a single dollar. In support of the struggle of the workers for freedom we pledge our all."

This was after war had been declared, when the Nation was trying to rally the men from the homes and from the farms for the support of the Government. But that is not all. I find further:

"The forces of capitalism which have led to the war in Europe are even more hideously transparent in the war recently provoked by the ruling class of this country. When Belgium was invaded, the Government enjoined upon the people of this country the duty of remaining neutral, thus clearly demonstrating that the 'dictates of humanity' and the fate of small nations and of democratic institutions were matters that did not concern it. But when our enormous war traffic was seriously threatened, our government calls

upon us to rally to the defense of democracy and civilization. Our entrance into the European war was instigated by the predatory capitalists in the United States who boast of the enormous profit of seven billion dollars from the exportation of American food-stuffs and other necessities. They are also deeply interested in the continuance of the war and the success of the allied arms through their huge loans to the governments of the allied powers and through their commercial ties. It is the same interests which strive for imperialistic domination of the Western Hemisphere."

Splendid support for the Government! Splendid seed to plant in the minds and hearts of the people in their distress: That this Nation is simply waging war at the behest of a few capitalists. But, further, as to the loyalty and patriotism of this defendant:

"The war of the United States against Germany cannot be justified even on the plea that it is a war in defense of American rights or American honor. Ruthless as the unrestricted submarine war policy of the German Government was, and is, it is not an invasion of the rights of the American people as such, but only an interference with the opportunity of certain groups of American capitalists to coin cold profits out of the blood and sufferings of our fellow men in the warring countries of Europe. It is not a war against the militarist regime of the Central Powers. Militarism can never be abolished by militarism. It is cant and hypocrisy to say that the war is not directly against the German people. If we send an armed force to the battle fields of Europe, its cannon will mow down the masses of the German people and not the Imperial German Government."

But a few days before, the President of the United States, in one of the most dramatic hours the world ever saw, in the House of Representatives at Washington had said to the world: "This country is not to wage a war against the German people." And this bunch of inflated egotists down there in St. Louis, while his voice is still ringing in the ears of the American people, gives him the lie and says it is cant and hypocrisy when he says it! That is the way the defendant wants to support the Government. But further:

"Our entrance into the European conflict at this time will serve only to multiply the horrors of war, to increase the toll of death and destruction, and to prolong the fiendish slaughter. It will bring death, suffering and destitution to the people of the United States,

and particularly to the working class. It will give the power of reaction in this country the pretext for an attempt to throttle our rights and to crush our democratic institutions, and to fasten upon this country a permanent militarism."

Looking into the face of the President of the United States and nearly every man in the Congress of the United States, the lie is given to them as to their purpose.

"The working class of the United States has no quarrel with the working class of Germany or any other country. The people of the United States have no quarrel with the people of Germany or of any other country. The American people did not want, and do not want this war. They have not been consulted about the war, and have had no part in declaring war. They have been plunged into this war by the trickery and treachery of the ruling class of the country through its representatives in the national administration and national congress, its demagogic agitators, its subsidized press, and other servile instruments of public expression. We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage. No greater dishonor has ever been forced upon a people than that which the capitalist class is forcing upon this Nation against its will. In harmony with these principles the Socialist Party emphatically rejects the proposal that in time of war the workers should suspend their struggle for better conditions. On the contrary, the acute situation created by war calls for an even more vigorous prosecution of the class struggle, and we recommend to the workers and pledge ourselves to the following course of action:"

I assume that the defendant is not a traitor to the Socialists.

Mrs. O'Hare. May I make a statement to your Honor?

The COURT. No, no; I have heard you. Here is the recommendation:

"1. Continuous active and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.

"2. Unyielding opposition to all proposed legislation for military or industrial conscription. Should such conscription be forced upon the people, we pledge ourselves to continuous efforts for the repeal of such laws and to the support of all mass movements in opposition to conscription.

"3. Vigorous resistance to all reactionary measures of press and

mails, restriction of the rights of free speech, assemblage, and organization, or compulsory arbitration and limitation of the right to strike.

"4. Consistant propaganda against military training and militaristic teaching in the public schools.

"1. We recommend that the convention instruct our elected representatives in Congress, in the State legislature, and in local bodies, to vote against all proposed appropriations or loans for military, naval and other war purposes."

—"and other war purposes." We were raising an army then. They were proposing to instruct their representatives in Congress to vote against raising a dollar for their support.

"2. We recommend that this convention instruct the National Executive Committee to extend and improve the propaganda among women, because they, as housewives, and as mothers, are now particularly ready to accept our message.

"3. We recommend that the convention instruct the National Executive Committee to initiate an organized movement of Socialists, organized workers, and other anti-war forces for concerted action along the lines of our program.

"(Signed) Kate Richards O'Hare, Chairman; Victor L. Berger, Job Harriman, Morris Hillquist, Dan Hogan, Frank Midney, Patrick Quinlan, C. E. Ruthenberg, Maynard Shipley, Geo. Spiess, Jr., Algernon Lee, Secretary."

Well, sometimes we get worked up in a convention, under the stress of the hour, and I looked further to see whether these views of hers were the result of sudden emotion or whether they were deep-seated. I was handed a little booklet containing a drama called "World Peace," of which Frank P. and Kate Richards O'Hare are the authors. It describes something of the terrors of conflict in the human family and of war. I wanted to see how she felt toward America, what view she had of this Nation of ours. I find America represented as one of the characters in this drama. The drama presents war brought upon the people by kings and capitalists. She presents a messenger who seems to be speaking from the hearts of the people, who has appealed to America for help, and she has America speak:

"*America.* Great God! How I long to take that step, but I am bound by unseen hands—the domination of business interests—and Europe will not listen."

That is the conception she had at the time she adopted these resolutions. It is the conception she has today of America—that it is helplessly bound by unseen powers, and that is the gospel she wants to preach.

"The Messenger. Warfare is to business what drunkenness is to a weary man; false strength, false power that must be paid for in deadly reaction. And Europe will be glad to listen.

"The Drummer (emblem of business power). Say, Sam, take it from me, if you let women butt in on this proposition, hell will be popping. They don't give a damn for business; they are sentimentalists. Duck the petticoats, old man, or we are in for trouble.

"American Banker. My friend is a little crude in his manner of expression, but quite sound as to logic. Allow me to donate half a million dollars to a fund to send doctors and nurses to Europe. It has always been the duty of womankind to bind up the wounds of the fallen, and if we can fix the minds of women on the noble work of nursing, they will not trouble us about an embargo or mediation.

"The Drummer. Good, I'll help in that," and reached in his pocket for money.

"America. Ah! Quite true, I understand. We must care for the women and children also. I will call my faithful aids, who have always been able to comfort my working people when strikes and lockouts, gunmen, and Cossacks have brought death and suffering to their humble homes. I shall call Charity and Religion to you."

Charity and religion the ready instruments of graft and greed!

"The Drummer. Beg your pardon, parson; I have to hustle to keep up with my job these days; business is simply humming.

"Religion. I am happy to hear you say so, brother, for I am on my way to carry the consolation of religion to the unhappy continent of Europe, and I trust you will contribute liberally.

"The Drummer. Sure! Just hold this stuff while I write a check. Take it from me, parson, the poor ginks need all the consolation they can get over there. That country is sure messed up something fierce.

"Religion. I am happy to perceive that you have a tender heart and a realization of your Christian duty.

"The Drummer. Sure, Mike.

"Religion. I am happy to have been chosen to carry the message of Christ to our unhappy brothers and sisters.

"The Drummer. What! Carry the message of Christ? Say, do you think I am going to put up my good money to have you spilling that 'Peace on earth, good will to men' bunk around over Europe now? I should say not! Peace on earth? Nix. Not when our fac-

tories are running twenty-four hours a day; not when we are getting 100 per cent advance on our shoes; not when unemployment here in the United States makes it possible for us to work our employes twelve hours a day and cut wages to the bone. Say, we can get a full grown man for nine dollars a week, a peach of a girl for four, and kids! Pshaw! they are so cheap that we buy them by the carloads.

"Religion. Brother, I rejoice in your prosperity, but is there not serious danger of undermining the morals of your females by compelling them to work for so inadequate a wage as four dollars per week?

"The Drummer. Morals! What in hell has morals got to do with making shoes? I don't suppose it is particularly moral for us to send our shoes over there so the poor boobs can wade through the snow to shoot each others' heads off, but it's darn good business. See here, parson, if you haven't a better line on morals and business than that, I don't think I can trust you to spend my money.

"Religion. You misunderstand me quite, brother. I see your viewpoint clearly. It is the message of Paul I wish to carry.

"The Drummer. Sure, Paul was all right! He was a good old scout. You just throw that stuff of Paul's about 'servants obey your masters' and 'women, if you want to know anything, ask the old man at home' around in big chunks, and send me a bill for the chunks. So long! I got to keep moving.

Blasphemy! I wonder if that is the sort of stuff the Christian people of North Dakota want their children to be fed upon in this great struggle for release from the "unseen powers" that bind them.

"Columbia. Neutrality—certainly the neutrality of hell—the money changers' pact with death—a bloody bargain with the war lords. Peace with damnation, that the profits of these speculators may be protected."

That is the way the defendant refers to the neutrality of the United States—her country—"neutrality of hell."

Again she has Columbia helpless. Columbia, speaking of bloodstained gold of any nation as acceptable, and America, helpless, bound, shackled, says:

"In the name of God, woman, have you no mercy! Why press the white-hot brand of my own soul's condemnation into my heart? Am I not human like yourself? Have I not eyes to see and ears to hear, and reason that can not be smothered? Have I not a soul that sees and feels and knows, the cursed needlessness of the sufferings of mankind? Why add your scorn to my shame, humiliation, and

self-contempt? The golden chains of international finances and business make me a galley slave. I am helpless.

It may be the people of this country want that gospel preached to them. It may be it is good stuff for the people of this country to get that sort of thing now in this hour of our Nation's peril; but I don't think so. If that is the sort of stuff the Socialist Party stands for, if its gospel is the gospel of hate and contempt of religion and charity, it has not any place on the American soil, either in times of war or times of peace. The worst poison you can instill in the hearts of men is a conscientious feeling that they are being deprived of their just earnings or their just deserts by some invisible power, and the whole theory of the Socialists and that type of people at the present hour is that capitalism is the sole instrument that brought on this war, and, as in the statement of Debs in the paper of which she is part editor, the banker is pictured as exempt from war.

I would not go so fully into these things at this time if it were not for the remarkable presentation by the defendant of her cause. When I say that she believes these things I am speaking earnestly. I do not think she is a hypocrite in regard to her belief as to this capitalistic domination. But the trouble about it is that there is no foundation for it. It is an aberration. I realize that we need reformers in this country; I realize that "eternal vigilance is the price of liberty"; I realize that the people must be led to give more attention to the affairs of their Government in the State and the Nation; I know there is room for reformers of the right type. But there is no room in this country for the reformer who can not see in the whole range of vision one single thing to approve, but everything to condemn. I listened on the trial to the testimony of the witnesses for the defendant. Not one word did they say that at any stage of her speech she said anything about this good old United States; that she ever expressed pride in its power, in its justice, or its right; that she ever paid a tribute to the American flag. The only reference she made to a consent to service in the

army was when she said "if they wanted to go to war, let them go and God bless them"; but she said herself here upon the witness stand that she ended that statement leaving it as a question as to whether or not the fertilization of the French soil by their carcasses would not be the best use they could be put to.

When she came up from the South she passed through the greatest empire God ever made—the richest empire in resources, the best adapted to human life—Iowa, Wisconsin, Illinois, the Dakotas, Nebraska, Kansas, Minnesota—soil and climate, coal and iron, and water, and everything that man can want. Who owns this empire? Did you ever stop to think about that? Who owns it? This Government owned it once—this "rich man's government," "dominated and shackled by the capitalists." Who owns it now? The men, or the sons of the men, or the grandsons of men, who came across the ocean in emigrant ships, or came out here from the eastern coast in prairie schooners. They were strangers in a strange land, coming here within half a century, without money and without friends, most of them. And yet today I will guarantee that at Mrs. O'Hare's meeting at Bowman seventy-five per cent of the audience rode to that meeting in automobiles. How did they get them? Why, this Government that is scorned and spit upon handed it out to whom? The people. What people? The bankers and capitalists? No; just to the common herd—the common people. It didn't ask what land or what country they came from either, or what their religion was, or their politics. It gave them a chance to come out here and go on homesteads, or buy land for \$1.25 an acre, and aided them in every way to establish homes, and own their land—children of ancestors who for a thousand years back in the old country sat there dreaming of a possible time when they might own 10 feet square of soil and never realized their dreams. Did she see these things when she came up here? No. Did she see the homes out there, reasonably comfortable for a new country? No. Did she see those schoolhouses every few miles where every child,

no matter how poor, has an entrance? No. Did she see the churches that are reared in sacrifice in all these communities, with their spires pointing up, mute emblems of hope? No. Did she see the universities and agricultural colleges to which every child can go, regardless of nationality, or creed, or wealth? No. She didn't talk about those things. She saw only injustice and wrong, and she brought to those people the message of their domination by unseen powers, and she got their applause, and she fortified them with a continuation of this gospel of hate by having them furnished with copies of the Social Revolution, which was given away as a subscription with each ticket to the lecture.

This is a grave matter. I say we need reformers in this country. We need them to go out and preach the gospel of the glory and power of the United States, and the right of every man to his share in the glory and power and justice of the United States; and we need reformers to go out and point out to them where they can benefit themselves by having a law enacted here and there, but we have no room for reformers who can not go out and preach reform, based upon the Constitution of the United States. We have no room for reformers, who in order to exploit their reforms must first drive out of the hearts of men and women every sentiment of pride and exaltation, and make them feel like abject slaves. We have no room for that sort of reformers. It is time that men and women should be giving careful consideration to these things. This is a new country, just in the formative period, and the children in these schools today are citizens who are going to run this country in a very few years, and it is important that they get the right viewpoint of life. Some Socialist may say it is easy for these judges to talk about things they do not know anything about. I do know something about it. I know something about the opportunities of the average fellow in this country. I came to the northern part of Iowa when I was a boy, poor, without a dollar, from my old home in Vermont. I never got beyond the white school-house on the corner of the farm until I was was 21 years of

age. It was in pioneer times when people lived poor, and worked hard, and my first work on the farm was for \$10 a month. I refer to that simply because I want to have you understand that I know what I am talking about when I say that carrying the message of despair to the people of this great empire of opportunity here is wrong, is indefensible.

These are times that try men's souls; we must have patience, and courage and loyalty and faith, and confidence and patriotism. And what is patriotism? The highest form of patriotism is willing submission to lawfully constituted authority. And where does lawful authority exist in this country? In the people of this Nation. But as men differ as to politics, the majority must control; the minority must yield to the voice of the majority. This is the only way in which a Republic may exist and endure. And how do the people express themselves in this country? Through their agents selected to speak for them—the members of Congress and the members of the Senate and the President of the United States. These servants of the people have spoken—Congress and the Senate almost unanimously—upon this war. No body of men and no body of women can resist the verdict thus rendered by the great majority of the people of this Nation without becoming rebels and traitors. A nation divided against itself cannot stand. And if this nation falls, in its ruins will lie, blasted forever, the most glorious hopes that ever brought joy to the hearts of men. This Nation is trying to preserve the rights and liberties of men; not the rights and liberties of the rich and powerful, but the rights and the liberties of the common people. We are trying to save from destruction the sacred rights of humanity for which our forefathers fought and died.

And in this dark hour we are proud that we have as our Commander in Chief a man who by the common consent of mankind, except our enemies, is the most dominant champion of human rights in the world. And the American people will not permit him to be insulted by the false, vicious and contemptible charge that he is the tool of graft or greed, or

that he permitted this war to be brought upon us by the Morgans, the Rockefellers, the bankers, the capitalistic class, the munition makers, or the profiteers of the nation. Those whose ideas and feelings as to this war are opposed to the policy of the Government—the small but egotistical minority who do not agree with the great mass of the American people in their determination to win this war—this minority must yield to the earnest, eloquent appeal of the President for unity of action and thought and purpose; they must submit, or they will be crushed by the majestic power of the Nation which will not tolerate traitors, no matter under what name they may try to hide their treason. American sons are not going to allow their mothers to be likened unto brood sows, and American fathers and mothers are not going to submit to having their sons assigned to no more glorious destiny than that of fertilizer for French soil. The American people are not going to stand idly by and see these boys that are marching away to the front, shot in the back by cowards and traitors. This Nation is willing to fight the enemy in front—she is willing to fight the assassins of the air, the pirates of the sea, the masters of the most brutal and diabolical savagery which the world ever saw; this Nation is willing to fight all this, but she will not consent to be stabbed in the back, and would-be assassins might as well realize that they must sheath their knives or submit to extermination.

This is a Nation of free speech; but this is a time of sacrifice, when mothers are sacrificing their sons, when all men and women who are not at heart traitors, are sacrificing their time and their hard-earned money in defense of the flag. Is it too much to ask that for the time being men shall suppress any desire which they may have to utter words which may tend to weaken the spirit, or destroy the faith and confidence of the people?

This is not the time to stir up party strife. It is not the time to be separated into groups of Protestants and Catholics and Jews. It is not the time for groups of Germans and French and Irish and Poles and Scandinavians and Russians.

It is a time when all men and women must be Americans, fighting side by side for American rights and American ideals; and anybody who interferes with this unity is giving aid and comfort to the enemy.

This defendant does not take pride in her country. She abhors it. From the Atlantic to the Pacific there is nothing she can approve; she can only condemn. She is the apostle of despair, and carries only a message of hate and defiance. She is sowing the seed of discontent. She preaches defiance of authority. She poses as a Socialist, but she is breeding anarchy. Even in those sad times of bitter stress she cannot refrain from inspiring class hatreds. She asserts here today that if at liberty she could aid the Government. "Aid the Government!" Why every day she is at liberty she is a menace to the Government. She proclaims that if she is punished her followers will assert themselves and that the cause she represents will gain in strength and power. Let them "assert themselves"; they will find that while this Nation is kind and generous, she is also powerful, and that when the loyal people of the country are fully aroused, traitors will receive the reward of their treachery.

Every person sentenced by a court must not only serve to expiate his own wrong, but he must serve as a warning to others. For these reasons the judgment of the court is that you, Kate Richards O'Hare, shall serve a period of five years in the Federal prison at Jefferson City, Missouri, and pay the costs of this suit.

An appeal being taken to the United States Court of Appeals, the judgment was affirmed on October 28, 1918 (see *O'Hare v. United States*, 253 Federal Reporter 538). And the Supreme Court of the United States likewise refused to interfere with the verdict and sentence (see 39 S. C. Rep. 257).

THE TRIAL OF WILLIAM WORCESTER FOR "DRIVING HORSES ON A TROT," BOSTON, MASSACHUSETTS, 1824.

THE NARRATIVE.

It was the law in the city of Boston in the year 1824 that no one should drive a wagon or other described vehicle through its streets except at a moderate foot pace, and should not suffer "their beast or beasts to go in a gallop or a trot." William Worcester was charged with violating this law. A witness testified that he saw Worcester standing in an empty cart with two or three horses drawing it; he thought they were going at the rate of 6 to 10 miles an hour, but would not say that all the horses were trotting or that the safety of anyone was in danger.

It appeared that Worcester was the driver of a wood cart and that one of the horses was such a fast walker that the others had sometimes to trot a little to keep up with their leader; but he never went faster than 5 miles an hour. The defendant's lawyers offered to prove that he was a careful driver and that it would raise the price of wood if such slow delivery of that necessary thing was required, and they also argued that such a law was an obsolete one and in conflict with the State law on the subject. But the trial judge would not allow such evidence, and driver Worcester was convicted.

THE TRIAL.¹

*In the Municipal Court, Boston, Massachusetts, December,
1824.*

HON. PETER O. THACHER,² Judge.

December 23.

William Worcester was charged that he, "on the 28th day of October, in the city of Boston, did drive two or more

¹ Thacher's Criminal Cases.

² See 2 Am. St. Tr. 858.

certain horses, then and there drawing a certain cart, said Worcester then and there having the care of the same, in and along Summer street, the same being one of the streets of said city, on a trot, and not at a moderate foot pace, against the peace and the form of the by-law of said city made and provided." The by-law in question declares that all carters and all other persons having the care of any wagon, cart, truck, or sled, passing through or in the streets of the town of Boston, shall drive their beast or beasts at a moderate foot pace, and shall not suffer them to go in a gallop or trot. He pleaded *not guilty*.

*James T. Austin*³ for the Commonwealth; *William Parker* and *Mr. Rand* for the Prisoner.

THE EVIDENCE.

Isaac Vose. Am a servant of Mr. Henry Gassett. Mr. Gassett instructed me to take notice and report to him the drivers whom I saw breaking this by-law. On October 28 and several days after I watched. On the first day I saw the defendant standing in an empty cart with two or three horses which he was driving; they were trotting along Summer street. They were going I should say at the rate of six to ten miles an hour. I will not say that all the horses were trotting. I will not say that anybody was being endangered by his cart.

Simeon Dow. Worcester is my servant, employed my me to drive one of my wood wagons; this wagon has three horses; the leader is a very fast walker; he walks so fast that the other two have to break into a slow trot to keep up; but I am certain that the leader never goes faster than five miles an hour; do not think he could walk or trot faster than that.

Capt. H. Prentice. Have often noticed these three horses and that the two have to trot to keep up with the walk of the leader; he is a remarkably fast walker.

Mr. Parker offered to show in evidence various conversations between the mayor of the city of Boston and the city marshal, with several persons, and particularly with the defendant, to prove that the said mayor and marshal had said, that the drivers of carts might drive their horses through the streets of said city at a moderate trot, and that no complaint should be made or prosecution instituted therefor.

Objected to and not admitted.

Mr. Parker offered witnesses to testify that defendant had been for

³ See I Am. St. Tr. 44.

several years accustomed to drive carts in the city of Boston, and was reputed and known to be a steady, prudent, and careful driver.

Objected to and excluded.

Mr. Parker wished to show by witnesses that if the drivers of wood carts were compelled to walk their horses it would raise the price of wood and so would be prejudicial to the public interest.

Objected to and excluded.

Mr. Parker. Gentlemen, this by-law is against common rights, as it restrains persons from driving on the highways even though they are driving carefully and so as not to injure anyone; the city has no right or authority to pass such a law. Even if it has it is obsolete, as no one before this has ever attempted to enforce it. There is a State law regulating the speed of carts and carriages, and that and not this city law must prevail; the only object of a speed law is to prevent injury to the lives and limbs of pedestrians and others, and it cannot apply where the street is empty at the time and there is no proof here that anyone was exposed to danger at the time defendant drove these horses. Lastly, the law is unreasonable and contrary to public policy.

Mr. Austin replied for the Commonwealth.

JUDGE THACHER. Gentlemen, towns in this State are a species of corporations or bodies politic and have a right to pass laws for the better government of the corporation, provided they are not repugnant to the general laws. By the charter of this city, the mayor and aldermen and common council may make all needful and salutary by-laws, and may enforce their observance by a penalty not exceeding twenty dollars. This law is on a subject, of which the city was the best judge. It is not to be presumed that the inhabitants would, in their corporate capacity, and with deliberation, enact a private statute for their own government, which was not called for by some real or supposed necessity. They would not wantonly forge chains for themselves. In a city like this, full of houses and inhabitants, with narrow and inconvenient streets, crowded with a busy, active and industrious population, all full of life and motion, and quite heedless of danger, a regulation to restrain carts and carriages from being driven

rapidly through the streets, seems to be necessary, to protect individuals from the innumerable accidents to which they would otherwise be exposed. The power to make private statutes or by-laws, being thus common to all corporations, it is to be expected, that they will vary according to the circumstances and objects of each. What would be prudent and necessary for the well-being of one, would not be so for another. What would be a discreet by-law for a literary, charitable, or manufacturing corporation, would not be applicable to a town, and what would be a prudent by-law for a populous and commercial city would be far otherwise for a country village. If the legislature should be called upon to enact the by-laws, which were rendered necessary for the convenience and comfort of each town, there would be no end to its session; and after all, the business would not be so well done as it now is by the inhabitants in their corporate capacity. I deem it to be wise and safe to trust this business to the inhabitants of the towns; because it will very rarely happen that they will voluntarily fetter themselves with unnecessary and inconvenient regulations. It is therefore properly left to the good sense of each town, to make their own by-laws, according to what they shall deem prudent and conducive to their peace, welfare, and good order. The limitation to the general power in all the towns is, that their by-laws shall not contravene the general laws of the State. The by-laws of this city are subject to the same restriction, and they may be repealed by the legislature.

The object of the present by-law is to require the drivers of carts to drive their beasts at a moderate rate or foot pace through the streets of this city. Such a by-law would be quite inapplicable to a country village, but in a place like this, full of houses and inhabitants, with narrow and inconvenient streets, crowded with a busy, industrious and active population, all full of life and motion, and quite heedless of danger, a regulation to restrain carts and teams from being driven rapidly through the streets, seems to be necessary, to protect the lives and limbs of men, women and children, and

to guard them against the innumerable accidents to which they would be otherwise exposed. The law is also intended to prevent the great noise which arises from driving carts over the pavement of the streets rapidly, to the annoyance both of the sick and the well. I should fail in the duty which I owe to the public, should I not say, that I deem this by-law to be a wise and prudent regulation, and binding on the inhabitants. It is repugnant to no principle of the constitution, nor to any general law of the Commonwealth; nor is it in restraint of common right; and although learned and ingenious counsel may suggest doubts and objections, yet we are not to suffer ourselves to be misled by their eloquence. It will be safe to consult and to follow in this case our common sense, which was designed by heaven to guide us on all occasions of duty. It is argued, that to compel the drivers of wood carts to pass through the streets at a moderate footpace, will greatly delay them in their business, and have the tendency to raise the price of wood. But this increase in price will fall on the inhabitants, who consume it, and not on the dealers in the article.

The jury returned a verdict of *guilty*.

On appeal to the Supreme Court the verdict was sustained. 3 Pickering, 461.

THE TRIAL OF BENJAMIN F. HUNTER FOR THE MURDER OF JOHN M. ARMSTRONG, CAMDEN, NEW JERSEY, 1878.

THE NARRATIVE.

Armstrong was a music publisher in Philadelphia, who had been loaned something like \$12,000 by Hunter, a former partner. Armstrong's business was in a failing condition and Hunter, to recoup himself, induced Armstrong to take out a policy of insurance payable to his, Hunter's order, on which Hunter undertook to pay the premiums. Hunter had him insured for \$26,000 instead of \$12,000, so that when Armstrong should die he would make something out of the operation. Armstrong was not a well man when the insurance was negotiated and some fraud was practiced upon the insurance company to induce it to issue the policy.^a Armstrong, however, continued to live and Hunter continued to brood over the situation. He was a dealer in heaters and hardware in Philadelphia, and had had a worthless fellow in his employ named Thomas Graham. He sent for Graham and told him that if he would kill Armstrong he would give him \$500. To this proposition Graham readily assented, getting something on account, and it was arranged that the murder should take place at a certain time. Hunter took the precaution to be away at that time visiting a brother in Virginia, so that he could prove an alibi if his name were connected with the crime. However, Graham's heart failed him and Hunter returned to find Armstrong still alive. He then adopted desperate measures. There was a man by the name of Ford W. Davis in Camden, New Jersey, who was a debtor of Armstrong's. Hunter induced Armstrong to go to Camden with

^a Hunter's brother, who was his executor, assigned the insurance policy to the Armstrong family, but the insurance company successfully contested its payment upon the ground that it was a fraud upon the company. This contention was sustained by the Supreme Court of the United States.

him one night to call on Davis and see if he could get some money from him. He had Graham go secretly along with them with a hatchet which he gave him marked "F. W. D." and when in a dark spot near Davis' house, Graham, according to arrangements, struck Armstrong on the head with the hatchet and he fell to the pavement. Graham dropped the hatchet and ran. Hunter tarried to see if Armstrong was dead, and, finding him alive, struck him several blows, and then went home to Philadelphia. The body and the hatchet were soon found and were carried into a drug store. Papers in the pocket of the wounded man disclosed his name and address and he was taken to his home in Philadelphia, where he lingered for a few days. Hunter, having been a friend of the family, was among the first sent for by the stricken relatives of Armstrong. He went to the house, and, being in the room with the wounded man who never uttered an articulate word after he was struck, disarranged the bandages on his head to make sure of his passing away. Ford W. Davis was arrested and imprisoned in the Camden jail for several weeks before the true story of the murder came out.^c

The affair preyed upon Graham's mind, and he, getting intoxicated one day, made some incriminating statements. He was arrested in Philadelphia, and, while in jail, made a full confession. Hunter was indicted for the murder, and after a long trial was found guilty. And Graham, having turned State's evidence, told the whole story on the witness stand.^d

^b It was common report that before the murder Hunter had Graham break into Davis' carpenter shop and steal his hatchet on which were his initials, "F. W. D." Graham testified that he got the hatchet from Hunter with the initials on it. As Hunter testified that he had nothing to do with the murder, the testimony of Graham on this point was uncontradicted.

^c The false accusation of murder and his incarceration told upon Mr. Davis and completely prostrated him. Shortly afterwards, partly out of consideration for his innocent sufferings, he was appointed crier of the Camden Courts, a position which he held for many years.

^d Graham, by becoming a witness for the State, had clemency extended to him, and instead of being executed was sentenced to 20 years in the State prison. (See *State v. Graham*, 41 N. J. (L.) 15.)

Hunter had some money and also a very wealthy brother; he was a man of some standing and there were ample means for his defense. His case was appealed, and a long argument made that the verdict could not be sustained, as the New Jersey Court had no jurisdiction to try him, because Armstrong had died in Philadelphia. But the conviction was affirmed and Hunter was executed in Camden on January 10th, 1879. Up to the very last he displayed wonderful nerve and apparently was indifferent to his fate, but collapsed on the eve of his execution and had to be carried on a stretcher to the gallows.

THE TRIAL.¹

In the Court of Oyer and Terminer, Camden, New Jersey, June, 1878.

HON. GEORGE S. WOODHULL, ²	} Judges.
JOEL HORNER, ³	
ISAIAH WOOLSTON, ⁴	

June 10.

The Grand Jury on May 8, found an indictment against Benjamin F. Hunter for the murder of John M. Armstrong.

¹ *Bibliography.* "Benjamin Hunter v. The State of New Jersey. New Jersey Court of Errors and Appeals in the court of last resort of the term November, 1878. In error to the Oyer and Terminer of Camden on Indictment for Murder. Appellant's Paper Book. George M. Robeson for Appellant. The Times Printing House, Legal Emporium of Philadelphia. 608 and 610 Chestnut Street." New Jersey Court of Errors and Appeals Cases, Vol. 47 (1878). New Jersey State Library. Trenton, N. J.

"Hunter-Armstrong Tragedy. The Great Trial. Conviction of Benjamin F. Hunter for the Murder of John M. Armstrong. This book contains the only likenesses of Hunter, Graham and Armstrong. Philadelphia. Barclay & Company. No. 21 North Seventh Street. 1878."

The Philadelphia Inquirer, June 11-July 5, 1878.

² WOODHULL, GEORGE SPOFFORD. (1814-1881.) Born Manalapan, near Freehold, N. J.; second son of John Tennant Woodhull, M. D.; graduated Princeton, 1833; studied law with Richard S. Field, Princeton; admitted to bar, 1839; moved to Freehold, 1842, where he practiced for several years; married (1847) Caroline, youngest child of Guysbert Bogert Vroom and Catalina Delamater of New

The indictment charged that Hunter, at Camden, New Jersey, on January 23rd, 1878, did make an assault on him by striking him with a hammer and hatchet and gave him a mor-

York; niece of Governor Peter D. Vroom; Prosecuting Attorney Atlantic County, 1850, upon which appointment he moved to Mays Landing; later held same office for Cape May; removed to Camden, 1862; in 1866 appointed to Supreme Court by Marcus L. Ward; reappointed (1873), by Governor Joel Parker; retired from bench and resumed practice in Camden, 1880, where he died. The late Rev. Kemper Bocock of Philadelphia, a clergyman of the Episcopal Church and one of the editors of the "Church Standard," was one of the reporters of the Hunter trial, and has written of it as follows: "Tall men, sun-crowned, who live above the fog, in public duty and private thinking." The above lines come into my mind as I try to recall the impressions received of Judge Woodhull by a young reporter who sat through the famous Hunter murder trial nearly twenty-five years ago. It was one of the most sensational crimes and one of the longest murder trials I have known of. It was a battle of legal giants. The debates became exciting at times. Counsel battled fiercely as if fighting for their own lives. On one occasion, the prisoner at the bar moved to a frenzy of rage, shook his fist at the witness and gave him the lie. In and over all this Judge Woodhull presided like one who lived in a serene clime. There was no act of conscious superiority or boredom but his calm, gentle voice issuing a quiet order to the tip-staves or ruling on a point as to which the contending counsel had seemed ready to come to blows, seemed invariably to introduce an element of dignity. It was not as though he took the side of the lawyer who carried the point, but rather as if the lawyer had taken the side of eternal justice and the Judge was there to show the harmony of the issue with that principle "whose seat is the bosom of God." The lawyers might be fiery or scorching in their sarcasm or strong in their wrath with one another but the Judge seemed an incarnation of peace and civilized order. When Hunter sprang up and called the witness (see *post*, p. 106) a liar, Judge Woodhull's tone was rather that of a mother quieting an unruly child than that of a severe magistrate rebuking an offender. It was full of sympathy and yet uncompromisingly firm, so that the incident lasted only a few seconds. I can see at this distance across the years that his spirit was suffering from the strain, but he gave no token of it. He never seemed to forget himself or let himself go for a minute. Even at the close of a long and exciting day his orders to the officers to keep the doors closed and the spectators in their seats until the prisoner had been removed, was as naturally spoken as if he had been making an observation on the weather, and without the slightest trace of impatience at the daily necessity of the repetition. I remember Judge Woodhull thus because I have not seen anybody else measure up to that rare stand-

tal wound from which he died at Philadelphia, on January 25th, 1878. There were in all six counts.⁵ Today the prisoner was arraigned and pleaded *not guilty*.

ard of modest dignity, conscientious justice and unfailing courtesy in the years that have since gone."

³ HORNER, JOEL. (1815-1889.) Born Delaware (now Pensauken) Township, Camden Co., N. J.; educated in local schools; taught school for a term but his principal occupation was that of an agriculturist and horticulturist, owning and conducting one of the largest farms in Camden County. He filled practically every township office of trust and confidence and was for many years the Township Collector of Taxes. Was twice (April, 1874; April, 1879), chosen by the Legislature as lay judge of Camden County and served two terms of five years each.

⁴ WOOLSTON, ISAIAH. (1818-1897.) Born Planterton, N. J.; Treasurer of Camden County three years and member New Jersey Legislature, 1878; lay judge Court of Appeals, 1878-1888; died in Camden.

⁵ Camden County, towit: The grand inquest of the State of New Jersey and for the body of the county of Camden, upon their respective oath and affirmation present:

First. That Benjamin Hunter, late of the city of Camden, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 23d day of January, in the year of our Lord, 1878, with force and arms at the city aforesaid, in the county aforesaid, and within the jurisdiction of this court and upon one John M. Armstrong, in the peace of God and of the same State, then and there being wilfully, feloniously, and of his malice aforethought, did make an assault, and that he, the said Benjamin Hunter, then and there, with a certain hammer, which he, the said Benjamin Hunter, in his right hand then and there had and held, the said John M. Armstrong in and upon the top of the head of him, the said John M. Armstrong, then and there willfully, feloniously and of his malice aforethought did strike, giving unto him, the said John M. Armstrong, then and there, with the said hammer, by the stroke aforesaid, in the manner aforesaid, in and upon the top of the head of him, the said John M. Armstrong, one mortal wound of which said mortal wound he, the said John M. Armstrong, from the said 23d of January, 1878, until the 25th day of January, 1878, did languish, and languishing did live, on which said 25th day of January, John M. Armstrong, of said mortal wound, died, and so the grand inquest aforesaid, upon their oath and affirmation aforesaid, do say that the said Benjamin Hunter, him, the said John M. Armstrong, in the manner and form aforesaid, wilfully, feloniously and of his malice aforethought did kill and murder, to the evil example of all others in like case offending, and contrary to the statute, etc.

Second. And the grand inquest do further present that the said

June 10.

The trial began today.⁶

Richard S. Jenkins,⁷ District Attorney, and *Wilson H. Jenkins*,⁸ for the State.

James M. Scovel,⁹ *Aaron Thompson*¹⁰ and *George M. Roberson*¹¹ for the Prisoner.

Benjamin Hunter, on the said 23d day of January, 1878, did upon one John M. Armstrong, willfully, feloniously and with malice aforethought make assault, and that he, with a hammer, did strike John M. Armstrong upon the top of the head, inflicting upon the said John M. Armstrong one mortal wound, from which the said John M. Armstrong, from the said 23d day of January, 1878, until the 25th day of January, 1878, did languish, and languishing did live, on which 25th day of January, 1878, the said John M. Armstrong, of the City of Philadelphia, in the State of Pennsylvania, of the said mortal wound died, and so the grand inquest aforesaid do say that the said Benjamin Hunter did kill and murder the said John M. Armstrong.

Third. And the grand inquest aforesaid do further present that the said Benjamin Hunter, on the said 23d day of January, 1878, at the city of Camden, county of Camden, upon one John M. Armstrong did make an assault, and with a hammer in his right hand held, upon the top of the head of the said John M. Armstrong, did strike, giving the said John M. Armstrong one mortal wound, of which said mortal wound the said John M. Armstrong, from the said 23d day of January, 1878, until the 25th of January, 1878, did languish and languishing did live, on which 25th day of January, 1878, the said John M. Armstrong, of the said stroke, died at a certain place out of the jurisdiction of this State towit., at the city of Philadelphia, in the State of Pennsylvania.

Fourth. And the grand inquest aforesaid do further present that the said Benjamin Hunter, on the said 23d day of January, 1878, with force and arms in the city of Camden, and within the jurisdiction of this court, in and upon the said John M. Armstrong did make an assault, and with a hammer held by him, did strike then and there, giving to him, by said felonious assault, one mortal wound of which said mortal wound the said John M. Armstrong afterward, towit., on the 25th of January, 1878, died at a certain place out of the jurisdiction of this State, towit., at the city of Philadelphia, State of Pennsylvania.

Fifth. And the grand inquest aforesaid do further present that the said Benjamin Hunter, in the city of Camden aforesaid, did, upon one John M. Armstrong, make an assault with a certain hatchet then and there upon the forehead and top of the head of said John M. Armstrong, strike him, and then and there giving to him by the said felonious striking divers mortal wounds, of which said mortal wounds the said John M. Armstrong, on the 25th day of

The following jurors were then selected and sworn: William S. Harvey, Isaac Kelley, William H. Doughton, Isaac L. Bigelow, George Warner, J. Clark Bradshaw, George T. Whit-

January, 1878, died at a certain place outside of the jurisdiction of this court, at the city of Philadelphia, in the State of Pennsylvania.

Sixth. And the grand inquest aforesaid do further say that the said Benjamin Hunter, on the 23d day of January, 1878, in the city of Camden, upon one John M. Armstrong, did make an assault, and the said Benjamin Hunter then and there did willfully, feloniously and of his malice aforethought, kill and murder the said John M. Armstrong.

⁶ "The prisoner at the bar was brought in. He was not placed in a dock, as is customary in our courts in such cases, but was given a seat directly back of his counsel, with each of whom he shook hands, as well as with his brother, John C. Hunter.

"Hunter is a powerfully built man, who looks to be over fifty years of age, swarthy, but sleek and well preserved, appearing to be much better in health and spirits than his grief-stricken brother who sat behind him. He was watched by every eye in the court room, and many were the expressions of wonder that he could take it so easy. His countenance is sinister; he seemed unaffected by his terrible situation or his long imprisonment; he listened occasionally to the lawyers, rocking backward and forward on his chair, somewhat nervously, and then lapsing inertly, resting his head on the high back of his chair, closing his eyes, and apparently becoming inattentive to all that was going on."—*Philadelphia Inquirer*, June 11, 1878.

⁷ JENKINS, RICHARD STOCKTON. (1832-1892.) Born Wheatland, Pa.; received his academic education at Burlington, N. J.; began the study of law with Richard S. Field at Princeton and continued under Thomas P. Carpenter at Camden; admitted to bar, 1860; began practice in Camden; Prosecutor of the Pleas (1864-1884).

⁸ JENKINS, WILSON HEYWARD. (1846-1899.) Born Fenwick, S. C.; educated at the Citadel, Charleston and the Arsenal, Columbia, S. C.; removing to Camden, 1865, he entered the University of Pennsylvania, and began the study of law with Richard S. Jenkins of Camden in 1869; was admitted as attorney, 1873, and as counsellor in 1875; prosecutor of pleas, Camden County, 1884.

⁹ SCOVEL, JAMES MATLACK. (1833-1908.) Born Harrison, Ohio; son of Rev. Dr. Sylvester F. Scovel and Hannah Matlack of Woodbury, N. J., daughter of James Matlack, a former member of Congress; graduated Hanover College, 1850; taught school near Memphis, Tenn., for two years, then removed to Camden, N. J.; became a student in office of Abraham Browning; admitted to bar, 1856; devoted much of his leisure hours to literature and contributed many sketches to leading newspapers. Having attracted Abraham Lincoln's attention by a series of speeches in the Assembly of New

craft, James Kelley, Thomas I. Hambrose, Gottlieb A. Holl, Charles H. Shinn, Daniel Quicksall.¹²

Mr. Robeson asked permission to withdraw the prisoner's plea of not guilty for the purpose of making a motion to quash the indictment.

The COURT allowed the plea to be withdrawn.

Mr. Thompson read the grounds upon which the motion to quash was based. These were that while one count in the bill charged Hunter with committing the murder of Armstrong in the State of New Jersey, another count charged that the blow was given in New Jersey and that the death occurred in another State, while a third count charges the assault but does not allege death to have resulted in either State. Hunter was not triable for murder in New Jersey under the law, though he might be triable for assault and battery with intent to kill. The statute of New Jersey on the subject was very peculiarly worded, and it became a question whether the prisoner could be tried twice for the killing of the said Armstrong, once for killing him in New Jersey and again for the killing of Armstrong in Pennsylvania.

Mr. Wilson Jenkins contended that the bill was framed after

Jersey entitled "New Jersey for the War," was appointed Commissioner of the Draft for the First Congressional District. During the second Confederate invasion of Pennsylvania he was commissioned as a Colonel, raised a company in one day and took his command to Harrisburg, Pa., where it did good service for the cause in which they were enlisted, and after thirty days' service was mustered out. Represented Camden County in the State Senate, and after the war ended he devoted himself to the duties of his profession, the law, with occasional ventures in the field of literature. Spécial agent of the Treasury under President Arthur.

¹⁰ THOMPSON, AARON. (1822-1894.) Born and died in Philadelphia; studied with Saunders Lewis and was admitted to Philadelphia bar, 1845; was a busy general practitioner in the civil courts. See Philadelphia Public Ledger, Dec. 8, 1894.

¹¹ ROBESON, GEORGE MAXWELL. (1827-1897.) Born Oxford Furnace, N. J.; graduated Princeton, 1847; studied in office of Chief Justice Hornblower, Newark, N. J.; admitted to bar, 1850, and practiced in Newark until he removed to Camden; Prosecutor of the Pleas, 1859; made a Brigadier-General in 1861, and took an active part in the raising and organization of troops in New Jersey; Attorney General New Jersey, 1867-1869; Secretary of the Navy, 1869-1877; returned to Camden, 1877; Representative in Congress, 1878-1882; removed to Trenton, 1888.

¹² The work of impaneling the jury occupied about an hour. The jurors are mostly young men, probably not more than one or two of them being over thirty-five years of age. One of them, Warner, is a negro.

forms that had been used and passed upon in the courts of New Jersey for years, and had been decided to be sound pleading. If Armstrong had not died for a year his death would still be accounted murder if traceable to the assault committed upon him.

The *District Attorney* said that the peculiarity of the New Jersey law referred to by counsel on the other side was greatly to the credit of the State. Otherwise what the counsel seemed to desire would result, and a man charged with a hideous crime would go free because the law of New Jersey could not be made applicable to the case, and because he could not be tried anywhere else.

Mr. Robeson said that from anything that was said or done by counsel for Hunter he desired it to be distinctly understood that no admissions of the latter's guilt were to be inferred. The present was simply an effort to have the prisoner tried regularly and according to the law under which it would be tried. He defied counsel for the prosecution to produce from a single book any authority for drawing a bill so loosely as that against the prisoner was drawn.¹

The first and last counts charge a murderous assault at Camden county, and as to first count death nowhere, and as to the second, the death expressly by the words "then and there." See this count. The others, second, third, fourth and fifth counts charged like assault at same place but death in Pennsylvania. Now, these counts are incongruous and repugnant. Here are distinct felonies of murder joined for the killing of two persons of the same name or of one person twice—one in New Jersey and the other in Pennsylvania. As to the first count it is radically defective. In Wharton on Homicide, page 284, it is laid down as essential that the indictments should aver the deceased died in the county where the indictment

¹ The following analysis of the counts by the counsel for the defense contains the essential points which they elaborated in their arguments in support of the motion to quash the bill:

First Count. Instrument, hammer. One mortal wound at county of Camden of which he died, and so did kill and murder, *contra formam statuti*.

Second Count. Instrument, hammer. One mortal wound at county of Camden, of which he died at Philadelphia, in State of Pennsylvania, *contra formam statuti*.

Third Count. Instrument, hammer. One mortal wound at county of Camden; death out of jurisdiction, towit., at Philadelphia, Pennsylvania, *contra formam statuti*.

Fourth Count. Instrument, hammer; one mortal wound at county of Camden; death out of jurisdiction, at Philadelphia, in State of Pennsylvania, *contra formam statuti*.

Fifth Count. Instrument, hatchet; divers mortal wounds at county of Camden; death out of jurisdiction, at Philadelphia, in the State of Pennsylvania. *Contra formam statuti*.

Sixth Count. Instrument not described. Made an assault at Camden, and then and there did kill and murder him.

was formed. So in Wharton, page 284, it is said that in cases of felony, where two or more distinct offenses are contained in the same indictment it may be quashed.

The reasons for quashing were: First. Because the indictment joins a count for killing in New Jersey, with three counts for death in Pennsylvania, the same being distinct offenses at law. Second. Because the defendant is called upon to answer by one indictment two certain specific and independent felonies. Third. Because the indictment is defective in joining the alleged offense of killing one John M. Armstrong in two States, viz., one in Pennsylvania and the other in New Jersey. Fourth. Because the indictment is defective in joining counts of felony for the alleged killing of John M. Armstrong in two distinct places of different jurisdiction. Fifth. Because the first count avers no death within the jurisdiction of this court. Sixth. Because of incongruous counts in the same indictment. Seventh. Because the second, third, fourth and fifth counts set forth no homicidal offense at law and no jurisdiction of this court over the same.

The bill was defective as a whole, as each count charged the killing of a separate and distinct person. The bill was vague in its charges, and was drawn in a way that made it presumable that the counts had been multiplied to cover several crimes. The first count charges Benjamin C. Hunter with having killed John M. Armstrong in the city of Camden, and within the jurisdiction of the court. The sixth count charges that Benjamin Hunter assaulted, not the said John M. Armstrong, but "one" John M. Armstrong, "who afterward died in Philadelphia." The District Attorney here directly charges the prisoner with two distinct crimes in the same bill. Counsel did not deny the right of the prosecution to allege the same offense in a dozen different ways, so that the counts were not inconsistent with each other, but in this case, he argued, the prisoner was charged with the killing of two men, who could not be the same, one being killed in Camden and the other dying in Philadelphia.

The *District Attorney*. The indictment is good, first, because every one of the six counts are in every respect well pleaded. The first count being perfect under the common law precedents. And the second, third, fourth, fifth and sixth counts complying in all respects with the provisions of the law relating to offenses created by statute. It is a well settled general rule, says Mr. Wharton in his *American Criminal Law*, vol. 1, section 364, that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute. And that these counts so described it, I have already fully shown. Second. Each of these counts charges a substantive complete offense, and nothing is better settled than if any or either of them is good the indictment cannot be quashed (as Wharton says in his *American Criminal Law*, vol. 1, page 424). Third. Because the defendant in all these counts, however different in language they may be, is in fact called upon to answer, but one specific, independent felony. The sole crime charged

is murder, and murder committed within the jurisdiction of this court; and a crime thus charged, no matter under how numerous phases, and how many counts, is well pleaded and presented. And fourth and last, because all the counts in the indictment, if weighed and tested by the well established rules and principles of law, will be found to answer all the requirements. There is a certainty as to time, place and jurisdiction. There is neither duplicity nor repugnance in pleading. All the material averments and all the technical averments are set out with the requisite precision. It is a novel and unheard of ground for the quashing of an indictment that the counts are incongruous. But even that ground is untenable, because all the counts in fact charge the same offense, and really there is no inconsistency between them.

JUDGE WOODHULL, after a momentary consultation with his associates, overruled the motion, and the usual exception was taken and allowed, Judge Woodhull remarking that careful attention would be given to the exceptions.

THE DISTRICT ATTORNEY'S OPENING.

Mr. Richard S. Jenkins. Gentlemen of the Jury: One Thomas Graham, of Philadelphia, states that he was instigated and employed by Benjamin Hunter, the prisoner at the bar, to murder John M. Armstrong. Graham alleges that Hunter, having an influence over him, began to work on him last summer, and finally, in January last, had so corrupted and debased him that he came over here to strike the murderous blow. The details need not be gone into at present, as they will be developed during the trial. The statement of Graham is but the prologue to the tragedy. The law compels Graham to put himself in the position of an accomplice in order to make his statement, and every allegation he makes must be fully confirmed before you can attach any importance to it. We will show you confirmations of his statements that cannot be assailed successfully.

We will show you that Hunter had Armstrong's life heavily insured for his own benefit. That, although the defendant put himself up for a rich man, he was really poor; that he had only a claim of \$5000 against Armstrong; but that he negotiated early last December with three insurance companies for \$26,000 worth of policies on the murdered man's life, and that the defendant had a very large amount of money to pay about the time of the latter's death. He had a bond of \$1200

coming due, a mortgage of \$5800 on his real estate and other obligations that were pressing him. We will show that Hunter had an important moneyed interest in Armstrong's life and in his death. It will be shown that having twice previously failed in his effort to procure Armstrong's murder, Hunter made an appointment with Armstrong to come over to Camden to see a man named Ford W. Davis. We will trace Armstrong thence to Sixth and Vine streets, in Camden, where he was struck the fatal blow. And it will be shown to you that Hunter was with Armstrong all the time. We will show what the meaning was of the hammer found, with the initials "F. W. D." near the body of Armstrong, and that Ford W. Davis and Armstrong had some bickering about money affairs. We will show you that Hunter's attempt was to cast suspicion on Davis. We will show that the prisoner denied all knowledge of Armstrong's movements when the latter was found dying, and that he even denied that he had negotiated the life insurance policies until he could deny it no longer. We shall be able to lay before you ample corroborative evidence of Graham's statement; how the murder was to have been committed during Hunter's absence in Virginia; how, upon his returning home and finding it had not been done, Hunter redoubled his efforts, visited Tom Graham at his home, debased him with money and rum until Graham agreed to do the work.

The State would ask the conviction of Benjamin Hunter, the prisoner at the bar, on the statement of Thomas Graham, corroborated by competent witnesses. The State does not want to convict an innocent man, and the District Attorney would remind the jury that the onus would be on the State's representatives to corroborate Graham in every material point before the jury could be asked to attach any weight to his statements. That the State would be able to do this the District Attorney had not a doubt.

THE WITNESSES FOR THE STATE.

June 11.
Thomas Graham. Am 29;
married, one child; live in
Philadelphia; am a sheet iron

worker: was an apprentice of
the prisoner and worked for him
until I was 23; after I left him
did not see him often; boarded

with Mrs. Ulrich; saw prisoner last December on the street; he asked me if I knew John Armstrong. When I said "Yes," he said, "Come up this little street, I don't want anybody to hear me." When we got there he told me Armstrong had to be killed, and says, "I want you to do it. I'll give you \$500; if you don't do it you are no friend of mine." He said Armstrong was a blamed scoundrel; he owed him and everybody money; it would make a better man of Frank, his son, if he was killed. I said, "All right." Hunter said, "Don't come and see me, I'll send you word where to go." Next saw him Saturday before New Year. Went to his back gate about 7 at night; one of his twin daughters came out; she called him; I asked him for a dollar or two, he gave me five; said he would tell his wife I was after money to pay my rent. Next saw him when I was working in Stile's store with John McKenna. Hunter came and showed me a paper with a draft of the houses and alleys in Vine street in Camden. He took me to a tavern for a drink; after that he went to Virginia. Before that I met him again by appointment at Hughes' store; told me then he was going to Virginia and that he would have confederates here to tell him if it was done; gave me \$2. F. W. Davis' house was on the draft; Hunter told me Davis owed Armstrong money and Armstrong had been over there; saw Hunter next on New Year's Eve; we took a walk and had a drink at Major McGrewes tavern; he gave me a hammer which he said he wanted used.

I put it in my pocket and took it home. Next saw Hunter after he returned from Virginia; he gave me a postal card addressed to Mr. Davis and said: "This thing has to be done to-night"; that Armstrong would be over there at 7 that evening. I put the card in the letter box.

Mr. R. S. Jenkins. I propose to ask what was on the card.

JUDGE WOODHULL. It is not admissible at this point.

Graham. I did not go to Camden that night. Next day Hunter came to see me. I told him I went over but Armstrong did not come. He said, "That is queer; he was to be there." Told me to meet him later; that he was going to see why Armstrong was not there. When he came back he said Armstrong had been over there in Vine street. "I had to make up a lie and tell him I had given him the wrong number of Davis' house." Hunter asked me where he could get a cheap hat. I took him to Spellissey's store. Mrs. S. showed him some; he bought one for \$1; said he wanted it to go shooting in. He gave Mrs. S. a \$5 bill and he gave me \$1 from the change and told me to meet him at 8 and he would go over to Camden with me. Went home and got the hammer, and about 4 came out and took several drinks at places and after 6 met Hunter on the street; hardly knew him; he wore the \$1 hat and had a handkerchief around his whiskers. He gave me a hatchet marked "F. A. D." We stopped opposite Armstrong's house; Armstrong came out; Hunter took him by the arm and they walked to the postoffice

where Armstrong posted some packages. Then they walked to the ferry and got on the boat. I followed them; they went to the front and I watched them from the back; they got off at Camden and took a car. I ran alongside. They got off at Vine street. Hunter went up the alley, then came back and said "Yes." I hit Armstrong with the hammer; it slipped out of my hand; Hunter got between us; saw a light in a cellar; my heart failed me. Hunter said, "Hit him, hit him." I ran away, looked back and saw Hunter standing over Armstrong. I threw the hatchet away and ran into a cellar; ran through it and back to the ferry and got on the boat. It was agreed that when Hunter said "Yes" I was to give the blow. Hunter came back on the boat. I went up to him and he said: "Well, I have finished him. You threw the hatchet so far away I had to go from here to there (pointing to the outside post of the boat) before I could find it." When we got to the dock he gave me a quarter and I went and had a drink. Met Hunter the next morning on the street; he told me to meet him at Girard avenue and Broad at half-past three. I did, and he gave me two \$5 bills.

These are the hammer and hatchet Hunter gave me.

Cross-examined. After I left Hunter's place I worked at several places; was more than once discharged for getting drunk. Latterly I have been huckstering; drink a good deal, too. The night of the murder Armstrong wore an overcoat and fur cap. When I struck him with the

hammer he said: "God spare my life." Did not see him fall, but when I turned round he was on the pavement and Hunter was standing over him; did not touch Armstrong, nor did he grapple with me; did not see an express wagon there.

Did not tell about my connection with this until March, when I was arrested. Told the District Attorney; no inducements were held out to me; first made an untrue statement; that I did not know anything about the tools. Have never been under arrest before except for getting drunk; owe Mrs. Ulrich for board; have perhaps taken 25 drinks in one day; never said to anyone, "Hunter is a rich man, and I mean to put it on him." Had known Armstrong several years; he did not recognize me when I came up to him. I looked him in the face when I struck at him. I had suggested to Hunter that I use a pistol but he said no, that would not do; they would think he committed suicide and he could not get the insurance. Never applied to Hunter to get work for me; did not borrow money from him; never told anyone I knew nothing about his connection with the murder.

Mr. R. S. Jenkins. That postal card you said you posted to Mr. Davis; how was it signed? J. M. A. Did you ever see this card before (showing him a postal card)? Yes; I posted it on a Tuesday morning.

Mr. Robeson. Did you not read about the card in the newspapers? No, sir.

Dr. E. M. Howard. Am a homeopathic physician in Camden. On the evening of January

23 was called to Mr. Armstrong at Justin's drug store. Found him sitting in a rocking chair suffering from shock; gave him restoratives; he was wounded on the top and back of the head and the temple; the skull was fractured; considered them mortal wounds; stayed with him until eleven next day; he was never conscious; we removed him to his home in Philadelphia that night, where Dr. Thomas took charge; we decided not to operate; gave him stimulants; next morning Dr. T. removed some of the broken bone; he seemed easier, but did not regain consciousness. When I left him we did not think he had a chance of recovery. When I arrived at the drug store no one knew who he was; we searched him and found a pocket book, letters, a knife, a watch, and a little money; it was handed over to Officer Miller.

Cross-examined. The wounds were bruises rather than cuts; they were from a heavy blow; could not have come from falling on the pavement.

William Braddock. Am a druggist with Mr. Justin; on the evening of January 23 a wounded man was brought into the store by Mr. Fidell, Mr. Julier, and Mr. Baker at 10 minutes to 7; we sent for Dr. Howard; searched his pockets and found that his name was Armstrong; he was unconscious until he was taken away.

Frank Baker, John W. Julier, and Charles Fidell corroborated the last witness.

Peter Keen. Was night watchman on last 23d January; was called to Justin's drug store a little after seven and sent by

Officer Miller to the wounded man's home in Philadelphia; got there at ten before nine; came back with his son and brother.

John H. Miller. Am a police officer in Camden; was called to Justin's drug store about 7:30 on January 23; found a wounded man there and searched him; sent Keen to his home; what we found in his pockets we turned over to Frank Armstrong when he came; his clothes did not appear to have been rifled.

Erwin H. Ritter. Was at Mr. Armstrong's home when he was brought over about one; the doctor and his son were with him; helped carry him in and stayed there all night; was there again next evening.

George W. Lewis. Was at Armstrong's home when he was brought in about one; his son and brother-in-law, Lorrelliere, were with him; he was unconscious; noticed the wounds on his head.

Dr. C. H. Thomas. Am a homeopathic physician in Philadelphia; about 2 a. m. on January 24 was called to John M. Armstrong's home; found Dr. Howard there, his son and a lady; he was lying upon a bed unconscious; found four wounds on his head; one over the left eye; decided not to operate at once; went home and sent one of my students to watch; next morning removed some of the bones; he improved a little; saw him again at eleven; next morning my student notified me that he had died. The wounds I saw are ordinarily mortal wounds; he died from them.

Cross-examined. The wounds

might have been made with a hammer; there was nothing to indicate the position of the striker; those on the back might have been caused by a fall upon a projection in the pavement. Dr. Howard and Dr. Morgan assisted me.

Dr. Henry C. Chapman. Am coroner's physician in Philadelphia. On January 25 a body identified by Mr. Ritter and Mr. Woodruff as that of John M. Armstrong was examined by me. John M. Armstrong was 43 years of age and was 5 feet 8 inches in height; found a bruise over the left eye; an incised wound 1 inch long and an inch and a half above the left ear; there was a similar wound 1 inch long and 1 inch above the left eyebrow; there was a third, 1 inch long, on the top of the head, and a fourth wound 5 inches from the left ear, at the back of the head; removing the scalp, I found clotted blood beneath; there was a distinct hole or opening on top of the skull and in the left temporal bone; the fracture extended over the entire left side of the skull, and besides that the skull was clearly split across from side to side and across from front to back, and it required carefulness to prevent it from breaking into quarters; the brain itself was torn to pieces and disintegrated almost to the base; the lower organs were healthy; the cause of death was fracture of the skull.

Dr. William H. Hutt. Am a physician in Philadelphia; also a friend of the late Mr. Armstrong; was present as such when he died at his house Friday morning about five minutes

to six. He died from the injuries to his head.

Mr. Robeson. I object to any evidence as to the death of the deceased in Philadelphia.

JUDGE WOODHULL. The objection is overruled.

Ferris T. Price. Am a medical student with Dr. Thomas; was with Mr. Armstrong when he died; was nursing him from 5:30 Thursday morning until Friday morning.

Frank L. Armstrong. Am the son of John M. Armstrong; am 20 years old; at the time of father's death lived at 804 N. 17th street; am a music typographer; that was also my father's business, which he followed ever since I can remember; he was at one time foreman of the music typography department of MacKellar, Smith & Jordon's type foundry; my mother is living; have a brother 11 and a sister 4 years old; my father's place of business was 710 Sansom street; he had been in business alone four or five years; at one time he had a special partner, Benjamin Hunter; saw Hunter nearly daily; he often came to our place of business; saw Hunter at the office after he came back from Virginia; can not fix the time; father was so deaf that you had to elevate your voice in speaking to him to make yourself understood; can't recollect whether I saw Hunter at the office Monday previous to the murder; think I saw him there the day before the murder; saw him there on the day of the murder between nine and eleven; William F. Jones, Harvey Edgar, Charles Frischtman, my father and myself and others were present; saw father

and Hunter conversing; Hunter spoke to me and said that father and he were going out together, only he was going first, as it would not look well for them to go out together, it might create suspicion; he was going first and father would follow; I made no reply to this; he went out and left father in the private office; ten minutes afterwards father left; last saw father that afternoon at ten minutes after six, when I was going down the staircase and he was standing in the back part of the room; saw him that afternoon, between five and half past, hand a letter to Stephen H. Carey; when I saw my father in the drug store in Camden he was unconscious; I recognized him and called aloud to him; I then made arrangements to have him taken home; on the morning following the evening father was attacked, I went to Benjamin Hunter's house, 1304 S. 10th street, arriving there about five; Mrs. Hunter opened the window and asked who was there; I said "Frank Armstrong"; she went in and Benjamin Hunter came to the door and opened it; he was in his night dress; he wanted to know what was the matter; that was the first thing he said; I told him that if he would go back to the dining room I would tell him all; we went back there and I told him my father had been assaulted in Camden. I asked him if he was along with my father and he said "No." I told him that father had told me that he was going over to Camden with him that night. He said, "It is not so; I had no engagement to go; I had no idea of going to Cam-

den." "Perhaps," I said, "the party that told you that Davis had a bank account proved treacherous." Mr. Hunter said, "Perhaps so." He said, "Frank, only Saturday I indorsed a note for \$400 for your father; don't say anything to mamma about it, as I can't stand it." He then buried his head in his hands; he never asked me if my father was seriously hurt; Mrs. Hunter came into the room and I repeated what I had told Mr. Hunter; I said that the hammer and hatchet had been found with the initials "F. W. D." upon them; she said she would come to the house; then I left. Can not remember Mr. Hunter asking me how my father was at any time; he did not go with me to the house; think he said he would go with Mrs. Hunter. The day of the murder father and I went to a restaurant to dinner; do not recollect what restaurant it was.

Mr. R. S. Jenkins. Did your father tell you at dinner where he was going that evening and with whom and for what purpose?

Mr. Robeson. We object.

The COURT. Objection overruled.

Mr. Armstrong. He said in the morning that Mr. Hunter had told him that some one had told him that Davis had a bank account; that he had advised my father to come over and see about it and get the money and he would go with him. Father said he intended to go with Mr. Hunter and he and Mr. Hunter were going to Camden that night.

Mr. R. S. Jenkins. Was there anything said about a letter to

your mother? Yes, sir. From further conversation which you had with your father about his going to Camden, was the letter of which you have spoken written at your suggestion? Yes, sir. Were you at home that night? No, sir. You were away also? Yes, sir. Do you not remember anything your father said in the afternoon as to whether there was a letter written to your mother in reference to his going to Camden? (Objected to.)

The COURT. My impression is that the question is improper.

Mr. R. S. Jenkins. I think you testified that you saw your father deliver a letter to Mr. Carey? Yes, sir. Were you at home the next morning when Mr. Hunter came down? I did not see him.

Cross-examined. Father and prisoner had always been on good terms. Hunter came to the house on Thursday after the murder and on Monday. Father was a music teacher; he had given lessons to Hunter's daughter.

June 14.

Mr. Armstrong. The relations between our families were friendly and intimate. Hunter did not say that he had an engagement with father to go to Camden but at the last moment found he could not go.

Joseph Ashbrook. Am superintendent of agencies in Philadelphia of the Provident Life & Trust Co. Last December Hunter called on me; said he was a special partner with Armstrong, and to protect himself he would like to insure his (A.'s) life. Mr. Armstrong was examined

and an endowment policy for \$10,000 issued, at seventy. The policy was made out to Hunter and he paid the premium. Armstrong asked if he was ruptured and answered "No."

Cross-examined. Hunter said that Armstrong was his debtor to the extent of \$5,000. This is a common kind of policy—a creditor policy. The law is, as I understand, that the creditor can collect the whole amount on the death.

Dr. J. C. Morgan. Am a homeopathic physician in Philadelphia. Was called in consultation by Dr. Thomas on the night of January 23. Went to Armstrong's home at seven next morning. We decided to operate. (The witness confirmed the testimony of the other physicians.)

June 17.

William G. Hughes. I live at the lower end of Germantown and carry on the metal and slate-roofing business; have known Benjamin Hunter for six years; he was the inventor of a patent boiler which he kept on exhibition at my place of business, to which he was in the habit of frequently coming; had an office in the lower part of the place and there was a desk to which Hunter came nearly every day; he merely occupied the office and exhibited his boiler for sale; recollect seeing a young man about there with Hunter; several young men called there to see him on business about the boiler; do not know of anyone calling to see him on any business except in connection with the boiler. I was

moving during the week of the murder of John M. Armstrong; recollect seeing Hunter at my place twice during that week; once it was on Saturday after the murder and the other was sometime during the week prior or after, I would not like to swear to it; do not know Thomas Graham by sight; think I might recognize him if he was the man I saw at my place.

(The witness was then conducted to the cells by the sheriff to recognize Graham, and upon returning said:)

That is the young man whom I saw at my place and whom I saw there several times; the first time he came Mr. Hunter was absent and the caller refused to give his name and said he would come again; on a subsequent visit Mr. Hunter told me what the man's name was; this occurred one day just as Hunter was coming there and the man came up; Mr. Hunter shook hands with both of us. went inside and Graham remained at the door; Mr. Hunter did not mention his name, but said that he was an old apprentice of his; I saw the man once or twice in the week prior to that one; Mr. Hunter had no interview with him at that time; he and Mr. Hunter went away together.

Wm. L. Donnell. Am a grocer, doing business at 806 Walnut street; knew John M. Armstrong from six to eight years; on the 23d of January, the day of the murder, between two and three o'clock, Armstrong came to my store and told me that on the evening he was to be at Camden; that he was going to see Mr. Davis; that he had been there the night before and that he was

going back the same night; he said he was over there that night, had seen Mr. Davis and Mr. Davis was in very poor circumstances, and that a certain person had told him (Armstrong) that he (Davis) had money in the bank, and they were going over tonight to see about it; I asked him whether he thought it was likely that Mr. Davis, being so very poor, whether a man having money in bank would allow himself to suffer in that way, and I told him I did not believe it. This conversation was on Wednesday afternoon.

Ford W. Davis. I remember hearing of the assault upon Armstrong the day following; had some business with Armstrong; on the Tuesday evening preceding the murder he was at my house; did not expect him to return the next night; never saw him again. My initials are F. W. D. Had a hatchet but no hammer at or about the time of the assault, but it had not my initials on it, nor did I ever have a hatchet or a hammer with my initials cut upon the handle. (Witness was handed a postal card signed "J. M. A.," which had been directed to "Ford W. Davis," telling him that Armstrong would be over that evening.) I received this on Wednesday, 23d January.

Cross-examination. From the 28th of March to 1st of May I was in the produce business on Dock street in Philadelphia with J. T. Demaris; my place of business was next to a blacksmith shop, but I never borrowed a hatchet or a hammer from it and I never saw anyone in my employ do so; used some of Arm-

strong's notes—two in all—making in the aggregate about \$500; got them through a Miss Latimer, to whose order they were drawn for the purpose of starting me in business; Armstrong never charged me with embezzlement and he never said he would have me arrested, and I never said I didn't care a damn for him; I never had letters in my possession from Mr. Armstrong threatening me with a criminal prosecution; I was to try to raise some money for him and I did use the McNaughton note for my own purpose, but, then, he held notes of mine; Mr. Armstrong and I never were on bad terms; on the contrary, we were on the best of terms; do not know that on the very day Mr. Armstrong was assaulted he proposed coming over to have me arrested; he never charged me with forgery or embezzlement, either; the hatchet I had I used for cleaning bricks in a paper mill; was arrested for this murder and was locked up for nine days; don't believe I am held in bail now as a principal in this murder; Demaris also was arrested; Mr. Shively, a notary, of Philadelphia, never called upon me in reference to a charge Armstrong had against me; I did not speak of him to Armstrong with great bitterness and profanity.

James P. Demaris. Am a produce dealer and former partner of Davis; was arrested together with Davis for the murder; saw Benjamin Hunter on the Monday preceding the murder at my place of business; Mr. Armstrong was with him; Hunter asked me where Ford Davis lived.

Cross-examination. I had no

transactions with Mr. Armstrong; Mr. Davis issued some of the firm's notes to him; they were not paid; had no difficulty whatever with Armstrong; when Hunter asked me where Davis lived, Armstrong asked me if it was true that he was so poor that the church was supporting him; I said I believed it was; Armstrong said that if he thought it was so he would go over and release Davis; he said he would go over that night anyhow; I was arrested for the murder of Armstrong and I remained in jail eight days and nights.

Sarah A. Spellissey. My husband's hat store was at 1121 Passyunk avenue; have heard of the Armstrong murder; know this man, the defendant; to the best of my knowledge I couldn't say what time of day it was; it was some time before dusk; somebody was with him, but I couldn't say if he were old or young; he wanted a low-priced hat; the defendant came in and said, "Show me one of your dollar hats"; but I had none to fit him and I think I gave him a dollar and a quarter hat for a dollar; he said he was going gunning either over Rope Ferry or Gray's Ferry; don't know which; he spoke of different people down the Neck; it was a soft black hat; he left his silk hat and said he would call for it again.

Alice Coleman. Am Mrs. Spellissey's girl; remember seeing two men come to Mrs. Spellissey's store about January last to buy a hat; defendant is one of the two, to the best of my knowledge; saw Mr. Graham down in his cell the day I came over to Camden; recognized him

as the man I saw with Hunter in the store; it was on Wednesday when they came to the store; saw Mr. Hunter again the next day in the morning; he came in and asked for his silk hat which he had left behind the day before; he took the soft hat off his head and put the silk one on; he left the soft hat in the case and in the afternoon he came back again and I got him the hat. He asked me how business was.

James S. Jones. Reside in Philadelphia; lived there last January; have known Hunter for eight or ten years; remember hearing of John M. Armstrong having been assaulted in Camden and the arrest of Hunter; between the assault and the arrest saw Hunter at Broad street and Gerard avenue one afternoon but can not recall the date; spoke to him when passing; never met him there before or since; it might have been a day or a week after the assault that I saw Hunter, but can not tell exactly; a tall, stout man had been talking to him before I got there, but he went out the avenue.

John J. Hood. Reside at 525 Vine street, Philadelphia; have known Armstrong for four or

five years; recollect 23d January last; saw him in the morning and a few minutes before six in the evening and was talking to him about ten minutes of six at his office; it may have been before or after that time; talked to him for three or four minutes, then went to the washstand, washed myself, and went back to my stand and wiped myself; at that time there were several employes at the washstand and Mr. Armstrong was there; I said "Good evening" to him, but he did not reply; the towels which we used were usually kept at our workstands; don't know where Armstrong's towel was; he had glass, comb, and brush in his office, and I presume that his towel was kept there; could see a man in the private office from the north side of Sansom street wiping himself.

Albert F. Walter. Am in the office of the Manhattan Life Insurance Co. in Philadelphia; last December Hunter applied for a policy on John M. Armstrong, and after an examination we issued a policy for \$6,000, which was assigned to Hunter; the policy was delivered to Hunter and he paid the premium.

Mrs. Lydia Graham (sworn).

Mr. Thompson. We contend that she is incompetent as a witness for the State. I think it is well settled that the wife of an accomplice is incompetent to prove conversation. We do not know what they propose proving. An answer to our question on that point has not been given.

JUDGE WOODHULL. Is it your objection that she can not be a witness for any purpose in this case?

Mr. Thompson. Yes, sir. She is not competent to prove any conversation had with the prisoner.

JUDGE WOODHULL. State the ground of your objection. Is it that she is not competent as a witness for any purpose in this case?

Mr. Thompson. She is not competent because her testimony may

be hereafter used in the trial of the case against her husband Thomas Graham is indicted for the murder of John M. Armstrong, and he will be tried, we suppose, for that murder separately. The object is to introduce the testimony of his wife to show conversations with the prisoner.

JUDGE WOODHULL. It does not appear what it is introduced for. That will appear afterward when questions will be asked.

Mr. Thompson. It is upon the broad ground of incompetency that I say she is not competent, because her declaration may be used hereafter in the trial of the case against her husband; and the law will not permit a wife to testify against her husband and will not permit her testimony to be taken for the purpose of conviction in the trial of his case. Suppose she swears that certain things occurred that implicate her husband. For the purpose of convicting this man Hunter she is offered as a witness in connection with that. Suppose that her testimony bears upon his alleged guilt and yet implicates her husband. That must be the tendency of it. The implication of her husband in guilt may be used hereafter against him if she were to come upon the stand as a witness in favor of her husband.

JUDGE WOODHULL. That she could not do.

Mr. Thompson. I do not know what offers will be made, but I am supposing that any declarations of hers will be given in evidence for the purpose of implicating her husband and for the purpose of convicting Mr. Hunter.

Judge WOODHULL. You are assuming a little more than ought to be assumed—that is, that she is called here to testify to matters that would implicate her husband. There is no trouble about implicating her husband, because he has implicated himself to such an extent that it is impossible that anything could be added to that; and I do not see that it could vary his case any or put him in any worse position, if that is your fear.

Mr. Thompson. The policy of the law is to prevent a wife from testifying against her husband.

JUDGE WOODHULL. That is a special objection. The question here is whether she is competent in this case for any purpose.

Mr. Thompson. First, I say, the policy of the law excludes it, because she can not transgress that confidential relation between husband and wife. The law does not suffer it except where the wife who is offered as a witness has suffered violence at the hands of her husband.

Mr. Wilson H. Jenkins. Mrs. Graham can be asked any question except that which will subject her husband to an indictment. Graham is not jointly indicted with Hunter. We do not want to ask her any question which will criminate her husband. We desire her as a witness against Hunter.

The Court. Under the circumstances we think she is a competent witness.

Mrs. Graham. I live at 35 Queen street with my mother-in-law; have been married eight years to Thomas Graham; in January last I lived at 1323 7th street with Mrs. Ulrich; have known Benjamin Hunter ever since my marriage; about two or three weeks before Christmas, on a Sunday, I saw him in Mrs. Ulrich's parlor; he asked me where he could see Thomas and I told him he went away; at that time Thomas was in Mr. Stile's employ, having regular work; saw Mr. Hunter several times after that; on New Year's eve at about half past seven my husband came home and handed me a bundle; could not say what it was. (This was the hammer, wrapped in paper, which Graham said he had just received from Hunter.) On the Monday prior to the murder, at 10 a. m., I saw Mr. Hunter again; he asked for Thomas and I said he was taken sick up at his mother's; about three in the afternoon I saw him again at Mrs. Ulrich's door and he asked for Thomas; saw him again at about five the same day at the same place and he again asked if Thomas was home; saw him again that day about half past five and he again asked if Thomas had got home yet, and I said "No"; he came again that day about six and again asked for Thomas; never asked him what he wanted with my husband; I saw him again about half past six at 7th and Wharton streets; I went up to see if Thomas was coming; saw Mr. Hunter walking along with his hands behind his back and his head down; he again asked for Tom, and when I said he was not

at home he handed me the business card of a place at 18th and Cherry streets (Hughes' store); he said that he was going to get Tommy work; he was tired of seeing him running around. On the business card was: "Tom, meet me at nine o'clock. Benjamin Hunter." I was never separated from my husband; he (Hunter) never got Tom work, either after the murder or before it; I never saw him after that day prior to the murder when he came to our house so frequently.

Cross-examined. I knew Mr. Armstrong by sight. Did not ask Hunter to get work for Tom. He did not tell me to send Tom up to Mr. Hughes' every day and perhaps he could succeed in getting him a job, or, at any rate, it would keep him from the tavern. Did not tell him I would send Tom up, nor ask him if he did not go to let me know; he never got Tom work either before or after the murder.

Stephen H. Carey. Reside at 1917 Federal street; was employed last January by Armstrong, whose place of business was at 710 Sansom street, setting type; Mr. Armstrong's towel was hung above the safe; recollect the Wednesday Armstrong was hurt; was there at the office just before Armstrong; saw Hunter there that morning and know him, since he has been in the habit of coming to Armstrong's office; Hunter came in that morning between ten and twelve; saw him go into the office and think he shut the door; saw him talking to Armstrong; heard him say, "This man has a bank account, I've heard; you go there

this evening at seven o'clock and I'll go with you." When going out, Hunter spoke to young Armstrong, but only for a moment; can not say if Armstrong went out that morning or not, afterward; Armstrong was deaf and we always had to speak very loudly to him; he talked to me that afternoon about half past five or six, and he gave me a letter which I then put in my pocket; left the office about ten minutes of six and Armstrong was there; his son told me where

he was going that night; gave the letter to the servant girl at Armstrong's house that evening; it was enclosed in a yellow envelope, addressed to Mrs. J. M. Armstrong; can not tell whether Armstrong was more deaf in one ear than another.

Cross-examined. Did not hear Hunter speak of Philip Armstrong's bankruptcy sale or say to Armstrong, "I will meet you over there." Hunter and he seemed to be on good terms.

Mr. R. S. Jenkins. I propose now to call Mrs. John M. Armstrong for the purpose, among other things, of identifying the letter which we allege was written by Mr. Armstrong to her on the afternoon preceding the night of the murder. She is in very miserable health and therefore I ask as a favor from the other side that if there is to be any objection made or any question of law argued in regard to this letter it be argued now and settled before she is called as a witness.

Mr. Thompson. We object to the evidence. I do not understand that the ruling of the Court covers this present offer. Whatever your Honor has deemed admissible within the doctrine of *res gestae* I do not understand is to be applied to this present offer: I do not understand whether your Honor has seen the contents of the letter.

THE COURT. I have not seen the letter.

Mr. R. S. Jenkins. The offer is to prove that such a letter was sent to Mrs. Armstrong and then to offer the letter in evidence.

Mr. Thompson. We shall object to the admission of the letter on the ground of the character of the communication which it contains and especially because it refers to an apparently innocent party in no way connected with the writer of that letter at that time who was not present, was not made a party to it, did not acquiesce in it, made no appointment under it, did not direct or suggest it, nor ratify it after it was written. If this letter should be admitted in evidence before this jury the State would perhaps follow it up by bringing testimony here from anywhere they could gather it in the city of Philadelphia, to show that Mr. Armstrong had written other notes on that occasion in reference to the defendant as well as indulged in conversation relating to him. It is not in the nature of a dying declaration. If it were a dying declaration of course it would be evidence against Mr. Hunter, but it is admitted to have been written by Mr. Armstrong when he was in full life and certainly a long time before the alleged assault occurred. The precise time does not appear although it is supposed to have been written prior to six

o'clock at which time Mr. Armstrong, as I have said, was in full health, had engaged in business during the day, carried out business transactions and doubtless made declarations to various persons and then it would appear had suddenly sat down and scribbled that note, addressing it to his wife. The position in which the defendant is placed becomes obvious. Any man could sit down and write a letter to his wife in Philadelphia, saying that he would be at a certain place with a gentleman whom he names, and if his death occurred then, although without the knowledge of the third party, implication of knowledge might attach to him, and he be arrested for the crime of murder because of the non-appearance of the writer at a subsequent time. This is the precise position of Mr. Hunter in this case. The writer of this note indicates that he designed to be at a certain place in company with a certain person, and that person in this case is the defendant, Mr. Hunter, and without his knowledge and without his presence this letter is indicted. We cannot see how that letter is binding upon the defendant, and therefore as he is entitled to meet his accusers face to face, which he cannot certainly do if this letter, written without his knowledge and without his consent, is admitted in evidence—we object to the admission of the letter.

Mr. R. S. Jenkins. All that we desire to show by this proposed witness is that the letter referred to by Mr. Carey was received by her on the evening of the assault upon her husband, and that she identifies it as her husband's handwriting.

Mr. Robeson. It is not a part of the *res gestae*, is not a dying declaration, and does not come within the range of *ex necessitati rei*.

JUDGE WOODHULL. I would suggest whether looking at this letter and the contents of it in connection with what is shown to have passed between Mr. Armstrong and Mr. Hunter if the language Carey testified to as uttered by Mr. Hunter to Mr. Armstrong had been responded to by Armstrong and he had heard that there would be any trouble about showing in that way that it was due to an arrangement.

Mr. Robeson. Certainly not, because Hunter was then present.

JUDGE WOODHULL. It appearing then that an offer had been made by Hunter to Armstrong to come over here with him cannot this testimony be used to show Armstrong's acceptance of the offer and therefore to show the arrangement between them for the purpose? It seems to me that the preceding evidence has materially changed the status of this piece of testimony.

Mr. Robeson. Only to make it more incompetent to my mind. It is offered here as of the nature of a declaration, and it is to be admitted not because it is one of the *res gestae* but as deduction upon which to form some other declaration made by Mr. Hunter or in his presence. If, when Mr. Carey heard Mr. Hunter say to Mr. Armstrong, "You go to Camden and I will go with you," Mr. Armstrong had said, "Yes, I will go with you," that would be admissible, because that was a declaration made in Mr. Hunter's presence; but, if we avoid that and show it was not made in Mr. Hunter's presence

or was made, for instance, an hour afterward, would that be competent?

JUDGE WOODHULL. As a declaration, of course, it is not competent, and dying declarations are not on the same footing. But I think that that piece of evidence is competent for some purposes certainly. It is not necessary now to say to what extent, but if the Court should be satisfied that the evidence should be limited in its application, they will, of course, so instruct the jury. That has been done often. It often happens that a piece of evidence is proper and competent for a certain purpose, but not beyond that, and the Court in such a case has to limit the effect of such testimony and the jury are expected to and do ordinarily give to the testimony that weight which the Court in such cases as a matter of law assigns to it.

Mr. R. S. Jenkins. We offer the letter in evidence.

Mr. Robeson. We now make our formal exception.

JUDGE WOODHULL. The letter is received at present as competent to show that up to the time it was delivered by Mr. Carey, Mr. Armstrong had the understanding and purpose to go over to Camden for the purpose it states.

Mr. Wilson H. Jenkins read the letter as follows:

J. M. Armstrong,
Music Typographer.

Electrotyper of Sheet Music; Music Books of All Sizes and Styles;
Music for Monthly and Weekly Periodicals, Leaflets,
Thematic Catalogues, Music Titles, Etc.

No. 710 Sansom Street. Philadelphia, 187...

"I will not be home much before 9 o'clock. Am going over to Camden again with Mr. Hunter on business connected with Davis matter.

"John M. A."

"Frank will not be home to supper; he is going down to Goudey's to tea.

"J. M. A."

The envelope is addressed to

"Mrs. J. M. Armstrong,
"804 N. 17th Street."

Mrs. J. M. Armstrong. I received this letter on the evening of 23d January last, about 7 o'clock, from the hands of the servant girl, Annie Lyons; have known Mr. Hunter about eighteen years; saw him the morning after my husband was brought home between seven and nine o'clock; sent for him; was at my mothers on Fourth street the night my husband was killed; when I heard of the assault I

went from there to Mr. Hunter's; rang the bell several times but got no answer; went home; saw Mr. Hunter the next morning and said to him: "Mr. Hunter, isn't this terrible? Why did you not go with Mr. Armstrong? If you had gone this would not have happened." He replied: "Mrs. Armstrong, I had no idea of going to Camden; I told Mr. Armstrong not to go to see those bad men as they would get him

into trouble." I said I understood he was to have gone over to Camden with Mr. Armstrong on Tuesday evening; he said he had had no idea of going, as he had had his niece as company at his house that evening; he asked me if my husband had recognized me to which I replied "No." I spoke to him several times but he did not hear me; he asked me if I had ever seen Davis or Demaris, and I told him I had seen Demaris. He said, "Davis is a bold, bad man; he has murder pictured in his countenance." He said he had advised Mr. Armstrong to keep away from him; Mr. Armstrong told me on Tuesday morning early that he was going over to Camden with Mr. Hunter; that he would be over about 9 o'clock; on Thursday morning Mr. Hunter told me he had no idea of going over with Mr. Armstrong; my sister, Mrs. Crossby, and Mrs. Smith were present at this interview with Mr. Hunter; I was not afraid to let Mr. Armstrong go over to Camden.

Cross-examined. On Tuesday morning my husband told me he was going over with Hunter Tuesday night with the Davis papers. The reason Hunter gave me that he had no idea of going Wednesday night was that his nieces or his wife's nieces were taking tea with him that night.

Annie Lyons. Have lived with Mrs. Armstrong since last fall, No. 804 Seventeenth street; recollect the evening Mr. Armstrong was brought home; Mrs. Armstrong was out; her young son, eleven years old, was the only person in the house with me,

a letter came about 7 o'clock which I gave to Mrs. Armstrong when she came home; the next morning when Mr. Armstrong was lying in the sitting room Mr. Hunter was with him; I either handed a towel to Mr. Hunter or he took it from me—I can't say which—I said, "Ain't this dreadful?" To which he made no reply. I took this towel up with others for the use of Mr. Armstrong; his head was bandaged every time I saw it.

William H. Stiles. Reside at the Merchant's Hotel, Philadelphia; am a manufacturer of stoves, heaters, etc.; have known Mr. Hunter for perhaps eighteen years; know Thomas Graham; he worked in my employ from 8th October till 22d December last; discharged him because I had no work for him; saw Hunter at my place on Monday, December 22, between 9 and 10; he asked for Thomas and after some desultory conversation he left; saw him previously at my store Monday, December 17th; Graham was at work on the Quarry street side of my store. Graham worked steadily and faithfully all the time he was in my employ; kept him as long as I could find work for him; had no other reason but scarcity of work for discharging him.

Charles Gibbons. Reside in Philadelphia; my place of business is No. 138 N. Second street; knew Hunter; saw him at my place on Monday, December 17 about 10; Mr. Graham was with him; they took a glass of ale together; Mr. Hunter paid for both and also paid for a drink for a young man working for Mr. Stiles, who was not then

present; they walked out together; recognize Hunter.

John G. Hutchinson and *A. B. Frazer*, superintendents of the West Jersey and Federal Streets Ferries testified as to the time of leaving of boats at their respective ferries.

William G. Vogt. Have been requested by Prosecutor Jenkins to walk in Camden and Philadelphia between certain points from the foot of Market street to Second and Vine; it took seven minutes and to Fifth and Vine, eleven minutes; walked pretty fast; it took seven minutes to ride to Second and Vine and four minutes to walk up to Fifth street, making eleven minutes in all; crossed the ferry in five minutes; from the foot of Market street, Philadelphia to Tenth and Wharton occupied thirty-four minutes; to go in the street cars occupied twenty-three minutes.

John McKenna. Last December worked for Mr. Stiles; know Thomas Graham and Benjamin Hunter; on Monday, 17th January, was repairing a stove alongside of the store. Graham said to me, "John, this is Mr. Hunter." Hunter proposed to treat and asked me to go along but I refused to leave my work, and the other two went away; Graham was gone about five minutes. I next saw Hunter on a day I cannot recollect; it was after Graham was discharged; he asked, "Is Tom in?" I said "No, he has been discharged for want of work," and Hunter then went away.

David Barton. Am an expressman. On the night of the murder, as I drove up to Mr. Russell's home, I noticed two men

going east. I left my horse standing in front of Russell's door; it was not hitched. Would it stand if there was anything to excite it—any noise? It might that night. I think it would not stand if there was any row or noise.

Sarah A. Smith. Reside in Philadelphia; am married; know Mr. Armstrong; heard that he, Armstrong, was injured Thursday, 24th January; saw him that day in the morning at his residence; know Hunter; have known him fifteen to eighteen years; saw Hunter that morning about half-past eleven in the dining room of Mr. Armstrong's house; his wife was with him; asked Hunter where he was that night. He said: "I don't understand you, Mrs. Smith; I was not with Mr. Armstrong last night. I have not been in Camden for months." I said: "If you had been with him this might not have happened." I remained at the house with the doctor and Mr. Armstrong in the sick room. Mr. Hunter came in. I said: "I wish that the murderer could only see his victim—that he would be smitten;" he did not say anything. I then left Mr. Hunter in the sick room. When I came back, saw the towel and bandages all bloody. I said: "What is the matter?" Went up to Mr. Armstrong and saw that he was bleeding. I said: "Oh, Mr. Hunter, he is bleeding to death; run for a doctor!" I had left a napkin on Mr. Armstrong's head; it had been removed; there was no blood over it; did not see the towel afterward; Mr. Hunter then left the house, but did not return; the napkin had been re-

moved and the towel put in its place.

Cross-examined. Asked him if it was not dreadful; he asked me if Mrs. Armstrong's mother had any means of her own; told him that I did not know anything about her business; when I left the sick room, I left him (Hunter) in the room; there was a muslin bandage around his head; a small piece of muslin on the top of the head; on the back there was a napkin; the napkin was clean when I left it; don't know who placed it on his head; the girl brought the napkins to the room; was away about fifteen minutes. Hunter did not say anything, only mentioned something about the hired girl; he did not say anything about a soft towel being better than a hard napkin; he made a remark that he was bleeding; the spots of blood were about the size of half dollars; I did not remove the towels; saw blood flowing; quite a quantity; I went downstairs and told Charlie Lorrelliere to go for a doctor; I left Mrs. Crossby and Hunter in the room. The doctor came about five; don't know whether he changed or removed the bandages or not. I wrung the sponge out before I left the room; I done it while Hunter was there; I placed it in the basin; I squeezed the liquid on Mr. Armstrong's head; I did not take it up again. Hunter said: "Mrs. Smith, if you wish to go downstairs, I will remain with Mr. Armstrong;" the doctor had performed the operation in the morning; the doctor did not say that it was not blood on the towel.

Mary Ulrich. Reside at No.

1323 South Seventh street, Philadelphia; have lived there three years; am married and have three children; keep boarders for a living. Mr. and Mrs. Graham boarded with me then; when Mr. Graham went to work with Mr. Stiles he came to board with me; knew Hunter before Christmas; he came to my house in the daytime and rang the bell; asked me if Mr. Graham was in; told him no, but that his wife was; took him into the sitting-room and called his wife. I did not hear what they talked about. He stayed about five minutes; saw him shortly afterwards at my house; he asked if Mrs. Graham was home; told him no; he called the third time, but I always called his wife; he would always ask for Mr. Graham; saw him again on 20th January, a Sunday; he came close to the window; it kind of startled me; I raised the window sash; he asked me if Tom was in; told him that he was out, but I would tell his wife. He said that he would tell me what he wanted. He said, "Tell Tom that I want to see him at Sixteenth and Cherry at 9 o'clock tomorrow morning; I have been trying to get him work, and I think I have now got him a job." Replied that Tom had already been there and that he had not seen him; he then said, "I will be there myself;" he then went away; did not see him again that day; delivered the message to Tom's wife; saw him the next morning at my door, between 10 and 11; he asked me if Tom was in; told him that his wife was in and called his wife. I did not hear what was said; don't know

how long he was there; he called again between 3 and 4 the same day; asked me if Tom had got home; he came again at 5; asked me if Mr. Graham had got home; told him he had not; he then went away; saw him again about 6; Mrs. Graham answered the bell; he had a basket on his arm; he had been there again, so Mrs. Graham told me, for she showed me his card; did not see him again until I saw him here; Thomas was discharged on the Saturday night before Christmas; he paid me his board regularly. Thomas had drunk more than he had previously.

Cross-examined. Had been keeping boarders about two years; Graham would get in between 9 and 11 o'clock, previous to his arrest; he was never out all night excepting when he was arrested; was not an abusive man; on Sundays he would go to his mother's; while he was working he did not drink—only on Saturdays and Sundays; know Mr. Yoder; I went with him upstairs to see Mr. Graham.

Harvey R. Edgar. Reside in Philadelphia; am a music compositor with John M. Armstrong, at Seventh and Sansom; was in his employ on 23rd January; first heard of his being hurt on Thursday; Wednesday afternoon was the last time I ever saw Mr. Armstrong alive; saw Hunter that Wednesday between 11 and 12, standing over Mr. Armstrong at his desk in his private office. The door was shut; don't know how long he was in Mr. Armstrong's office; was busy all day at my work. Mr. Armstrong was in the office in the afternoon; left off work about 6; Mr. Armstrong was

there; he left the office after me; I left eight minutes after 6 by the office clock; all the rest had gone home and no one was there but Mr. Armstrong and myself; did not see Mr. Pfeiffer when I left. (Designated the position on the map where the men stood in the office of Mr. Armstrong on Wednesday.) Had to take the car to go home at Sixth and Walnut. When I was going home Mr. Armstrong said: "Here is a part of a work that you ought to have done more of;" this was in the entry; he had a package in his hand; a large envelope. I went downstairs and waited for Mr. Armstrong; when he came I had a conversation which lasted about five minutes with him; this was on the sidewalk; I never saw him alive since.

Cross-examined. There are two desks, a fireproof, piano and stool in Mr. Armstrong's private office; the washstand is some distance from the office. Mr. Armstrong was very deaf; the office door was shut; it was not always shut; it was shut when Hunter was in there; I broke the glass in the door some weeks previous; did not carry a watch that day; the reason that I noticed that it was eight minutes past 6 was because I looked at the clock; I always look at the clock when I quit work.

To *R. S. Jenkins.* The reason that I did not go to the Eighth and Walnut streets car was because I was detained by Mr. Armstrong; was too late to take that car; I went to Sixth and Walnut and took that car.

Edward Pfeiffer. Reside in Philadelphia; am a music compositor with John M. Armstrong

four years; was with him on 23rd January; know Hunter; I did not see him there on that Wednesday; Mr. Edgar and Mr. A. were in the office when I left; Mr. Armstrong would always wipe his hands in his private office; when I left Mr. A. was in his private office turning out the lights; Mr. Edgar was standing at the head of the stairs, I went down the stairs within three or four steps from the bottom; I was waiting for Mr. Edgar; found that he did not come and then I went home; noticed Mr. A. had some papers in his hands; I could not say whether they were letters or newspapers.

Cross-examined. You could not be seen from the outside pavement washing your hands, only heads and shoulders. There was a light burning in front of Frank's stand for the purpose of giving us light while washing; there was one burning in Mr. Armstrong's office; Mr. Armstrong kept his own towel on a rack in his private office by a window where he wiped himself after washing. He could be seen from the pavement on the north side of Sansom street while doing so.

Joseph C. Nichols. Am Dep-

Mr. R. S. Jenkins. We offer the letter in evidence.

Mr. Robeson. We object to it as utterly incompetent in connection with this case.

JUDGE WOODHULL. It comes in as showing what part Mr. Hunter had taken in this transaction. It is a letter admitted by him in the course of his examination. First he made a statement which afterward, upon seeing this letter, he admitted was incorrect, and this latter ought to go in.

Mr. Wilson H. Jenkins then read the letter in evidence as follows:

uty Sheriff of Camden. When prisoner was brought over here the Prosecutor asked me to take note of what he said. I did so; he was not sworn; his statement was voluntary; no threat or inducement was held out to him.

He said he did not know Mr. Davis and would not know him; he knew nothing in regard to the business between Armstrong and Davis; he said he had seen Armstrong on Tuesday or Wednesday, but that he never talked to him about Davis; he said he had made no such remark to Armstrong as that Davis had a bank account; he also said that he had said nothing about going to Camden. He said he was over at Mr. Epp's that evening from 6 o'clock until a quarter before 7; he got home about ten minutes to 8; he said he had Armstrong's life insured for \$26,000; \$6000 in the Manhattan; \$10,000 in the Mutual and \$10,000 in the Provident; he said he had nothing whatever to do with getting the policies, but that he paid the premiums; he said he knew of Armstrong's rupture but did not tell him to conceal it from the insurance men; identified this letter; said he had made a mistake in regard to it.

"J. M. Armstrong,
"Music Typographer.

"Electrotyper of Sheet Music; Music Books of All Sizes and Styles;
Music for Monthly and Weekly Periodicals, Leaflets,
Thematic Catalogues, Music Titles, Etc."

"No. 710 Sansom Street, Phila."

"Dec. 3, 1878.

"Please call at the Manhattan Life Insur. office, 414 Wal. street, between 12 and 1 o'clock to be examined.

"And also call at the Provident between 1 and 3, 108 S. 4th, for same purpose.

"I will put it in two companies.

"You will oblige me by attending to both of them today, and I will call on them tomorrow.

"Respy. yours,

"Benj. Hunter.

"To John M. Armstrong, Esq., 710 Sansom Street.

"N. B.—Leave off your truss for fear they would decline to insure you. B. H."

Mr. Wilson H. Jenkins. Mr. Armstrong had all these insurances negotiated upon his own responsibility? Yes, sir; that is what he said. And that he had nothing to do with it in any way? That he had nothing to do with the negotiations of these policies at all. And then after he saw the latter he admitted he was wrong? He said he had made a mistake. What did he say about arranging the insurances and selecting them? I think he said that he put it in two companies. Refer to your notes at next to the last page where he was asked: "How could you forget that." (Referring to the notes.) He said:

Mr. Robeson. Your Honor will see how improper the development of this testimony is. Here is a man brought over here ostensibly accused of crime; taken into the Sheriff's office without counsel and cross-examined.

JUDGE WOODHULL. Does that

affect the competency of the testimony contained in his statements? Is it incompetent in any view to show what he said himself voluntarily in reference to this matter?

Nichols. He said he selected these insurances himself, that is Mr. Armstrong.

Mr. Robeson. Are you reading from notes made by yourself? Yes, sir.

Mr. R. S. Jenkins. What did he say before that about the arrangement, "I did not arrange," does he not say? He says, "I did not arrange these insurances, he selected those insurances himself." Then he said, "I cave in on that;" that is when Mr. Jenkins showed him the letter.

Mr. Wilson H. Jenkins. Then what did he say about not being here on Wednesday? "I was not in Camden on the Wednesday. I could not go now where the man was killed on Vine street. I have no idea who done this thing. I think it rests with

Mr. Davis. They found his tools with his initials on them."

After he had made this statement was his son there at that time? He was; yes, sir. What did he say to his son when his son started home? He told his son to tell his mother for none of the family to go near Mr. Armstrong's place. What else? He said he wished Mr. Armstrong had been in hell six years ago.

Cross-examined. Hunter was brought here by Detective Yoder and Mr. Hunter's son—a lad was with them; did not tell prisoner I was a commissioner to take his testimony. Yoder took no part in it. Hunter did not protest; am not sure we warned him that his statements would be used against him. He said to me that Mr. Armstrong had selected the insurance himself; that he did not arrange them; when the letter was shown him he said he was not in Camden on Wednesday; he said he could not go to Fifth and Vine now; didn't see who could have done this; told his son to tell his mother for none of the family to go near Armstrong's house at the time of the funeral, and said he wished that Armstrong had been in hell six years previously.

Frederick Getz. Know Benjamin Hunter; he is my guardian; one sum of \$5,270.00 was to be paid to me when I came of age on the 27th of January last; I was not paid at that time but I was paid \$3,000 six weeks later on.

Samuel Mortland. Am driver and conductor of a North Second street car; on 23rd January last, between 6 and 7 in the evening was on duty; took no-

tice of two persons in the car; one was a large man with soft felt hat with a handkerchief tied across his whiskers; he also had an overcoat with a cape on; the other was a short one in a fur cap; my attention was attracted to them by the large man talking loudly; know it was the 23rd because it was one of my short days; the next day I heard of the murder; the men sat on the left-hand side of the car going up; the short man sat next to me and the large man just beyond him, kind of leaning over against him and talking very loud.

Charles A. Sherman. Reside in Camden; do business in Philadelphia; knew Benjamin Hunter since last October; he told me he was on a bond for eleven or twelve hundred dollars which became due in January; shortly after Mr. Armstrong's death Hunter told me he had six thousand dollars on Armstrong's life; we were discussing the manner of the latter's death; knew there had been business transactions between them; he said he was fortunate in having this amount secured; he said nothing about any other amount; knew that that eleven hundred dollars spoken of was on account of Philip Armstrong; do not know that it has been paid.

Joseph Moore. Reside at 318 Bridge avenue; am a plasterer and have resided here for fourteen or fifteen years; recollect the evening of January 23rd last; went that evening to Philadelphia; am in the habit of going Wednesdays and Sundays; am paying attention to a young lady in Philadelphia; started to go in the 7 o'clock boat for Fed-

eral street ferry. I then went up to Market street ferry, the boat was just coming in.

Mr. R. S. Jenkins. What did you see when you got to the ferry? I saw a man standing first at the outside of it; he was standing crosswise; he had a soft felt hat on and overcoat; his arms were folded and my attention was attracted to him; he acted as if he was cold and I wondered why he did not go in where it was warm; saw him again on the bow of the boat standing by the chain; saw a young man go up to him, and they went towards the ladies' cabin. Have you ever seen that tall man since? Yes, sir. Is he in the courtroom today? Yes, sir. He sits over there back of Mr. Scovel (the prisoner). Where did you next see this man? On the 2nd day of February, in the courtroom at a hearing. How did you happen to come here? There was a sale to come off and I had a judgment against the party who was to be sold out; I came here with Mr. Nichols, and when he gave his testimony I went back. Did you see the man that day? Yes, sir. The defendant here? Yes, sir. Did you recognize him? Yes, sir. From the time you saw these men at the chain until the 2nd of February did you say anything to anybody about it? Yes, sir; I told my brother-in-law, Reuben W. Smith. What boat was this you saw them on? I think it was the 10 minutes after 7 boat. Did you know Mr. Hunter before you saw him that night? No, sir. Was he the only person you noticed at the ferry? Yes, sir. Which side of

the boat were you standing on? By the gentlemen's cabin.

Mr. Scovel. When did you first make this statement to the authorities? On last Thursday night; I first broached the subject to William Hawkins, a police officer of the Fourth Ward, Camden. You saw the defendant in this courtroom at the preliminary hearing? Yes, sir; I came upstairs with Deputy Sheriff Nicholls to hear what was going on. When you saw him at the ferry, could you see much of his face? Not very much; he had his hat down; I could see the side of his face; when I saw him on the bow of the boat he had his back toward Philadelphia. Where did you go when you got off the boat? I went up Market street to Second; I thought of him on Thursday morning; a man at the building where I was working spoke to me of the murder and I said, "I wonder if the man I saw last night had anything to do with it?" What made you think that he might have something to do with it? He seemed to be very much excited when I saw him. How many people were on the boat? I could not say; I saw two or three other men, but no more. How was he dressed? He had on dark clothes, a dark overcoat and a slouch hat; he seemed as though he had something tied around his neck. How long did you stand outside the ferry before you went on the boat? I passed by and went right in. How do you know that it was not some other night that you saw this man? I don't go to see the lady only on Wednesday and Sunday nights. I know it

was Wednesday because I spoke about it the next morning to David Pearson when I went to work. You recognized the man the day you were at the preliminary hearing? Yes, sir. And you said nothing about it? Not to the authorities; I did not think it necessary. How came you to go to Mr. Hawkins last Thursday night and tell it? Because I thought it was my duty;

I did not tell it before because I did not want to get the young lady into it; but I thought it over and concluded to run the chance.

Mr. Jenkins. There is a bright light in front of the ferry house, is there not? Are you willing to swear that this is the man without any doubt you saw on the ferry boat? Yes, sir.

THE WITNESSES FOR THE DEFENSE.

June 20.

(A large number of witnesses testified to the good standing and character of *Benjamin Hunter* in the community where he lived and carried on business.)

Benjamin H. Lytell. Was employed as a watchman by the Sheriff of Camden; had the run of the jail and saw Graham many times, probably fifty; on 25th May took Graham's breakfast up to him in company with one of the keepers; at that time had a conversation with Graham who called me "Rocks." Graham asked me if "the old man," meaning Sheriff Daubman, didn't whack up with me, and I said yes. He said, "He's been very kind to me and has given me six dollars." Graham said to me that he would not get the rope for this job; this was on a Sunday; I said to him, "Tommy, it will be a great note if you will have to swing for this." He said that he only expected to go up the road for five or ten years; he said he didn't expect to be hung; that he would have to hang Hunter to save himself; he said, "When I go up the road will you come and see me?" He said that the coroner's physician

had testified at the preliminary hearing that the first blow, the one he (Graham) struck, had not caused death. I was present and heard him talking to Emma Bethel. I entered into the conversation. Keeper Kennedy was also present.

Cross-examined. Am married; do not live with my wife; had been working the case up for Scovel out of pure love without any hope of reward; am "setting up a little job" on my own account; am drunk a good deal of the time, and am boarding with Mr. Hagerman without any specified conditions of what I have to pay; I signed the pledge not to drink in the future, but was drunk when I did so.

George B. Carr. Am a member of Philadelphia bar; knew John M. Armstrong; had business with him on the McNaughton note; sued Mr. Armstrong and he came to my office; he paid me the amount of the note to Mr. McNaughton on the afternoon of 23rd January between 3 and 4; Mr. Armstrong called on me at my office; he gave me an order for the two notes; he said: "I am going over to Camden to get a settlement with

Davis and Demaris, and if I don't get it, will you be ready to begin that criminal prosecution." He had previously spoken of this at a former interview in front of his place on Sansom street; he said Davis was a thief and suggested bringing a prosecution against him for forgery and embezzlement. I suggested that he should employ a Camden lawyer. Four or five weeks before the assault Armstrong called at my office and said: "Don't you want to begin that prosecution? Davis has made threats against me and he is a bad man." On the afternoon of 23rd January—when he said he was going over to Camden to get a settlement with these people—I arose and shook hands with him and said I hoped it would be satisfactory; he said if it was not he would come back and get me to begin the criminal prosecution; these were the last words he said as he was coming out; at a previous interview he said he would get "Ben," meaning Hunter to indorse the note; he said Hunter was the best friend he ever had and was the only man who would indorse paper for him.

Martha M. Hunter. Am the daughter of defendant; am 18 years of age and a teacher in the public schools in Philadelphia; have been so engaged since 1st of January; knew John M. Armstrong and remember the night of January 23, when he was assaulted in Camden; came home that evening a little after seven; about eight o'clock I was in the dining room when father came in the front door; he had on a high silk hat, the only kind he

ever wore, except a straw hat in the summer time; he came in as usual and I noticed nothing unusual; he took off his hat and overcoat and ate his supper; after supper he looked for a paper and, not finding it, borrowed one from a neighbor; he then read for a while and after finishing his reading went upstairs and I did not see him again that night. The coat he took off when he came in was a cloak something of a brown color; it had no cape to it; he had a coat with a cape, but it was a long time ago; it was a black one; a walking jacket was made out of it for my mother some years ago by a lady who does the sewing for our family; there is no other cape in the house and for the last three years I have not seen him wear a coat with a cape on it. On the next morning after Mr. Armstrong was assaulted my mother came up into the bedroom and told me about the occurrence and that Frank Armstrong had been there; afterward, down in the dining room, Mr. Lorrilliere, Mr. Armstrong's brother-in-law, and my mother and father had a conversation about it; Lorrilliere said, "Isn't this terrible?" He then spoke of Armstrong's wife having received a message from Mr. Armstrong stating that the latter was going over to Camden with Mr. Hunter. Lorrilliere then said to my father, "I suppose you can locate yourself," and "You'd better hurry and bring the parties you were with," and papa said he would not hurry about it. Mother and father were not excited; both were as calm as ever they were; Lorrilliere was the

only excited person present. Mother did not say, "Oh, papa, what does this mean?" nor did father reply that there was no truth in it.

(The hatchet and hammer were shown to her and she testified that they did not belong to her father. Hunter's son corroborated his sister's statement.)

Emma Bethel, recently on trial in Camden and acquitted on two indictments for murder, was then put on the stand and testified to a conversation she had with Graham while in jail and corroborated what Lytell had said.

Washington L. Young. Am a car conductor on the Tenth and Eleventh street line, Philadelphia; live at 1204 N. Twelfth street, Philadelphia. Know Mr. Hunter; saw him on the evening of 23d January last; he got on my car at Jefferson or Oxford street or Columbia avenue on my down trip; this was on the Wednesday night previous to his arrest and was on my lodge night; had a conversation with him then that makes me remember the night and the circumstances; when he got on the car he asked me how I was and I replied that I felt well but had been disappointed in not getting off from duty that night so I might attend my lodge meeting; my lodge meets at eight at Sixth and Cresson; my car runs by Hunter's house and he frequently rode with me; knew him personally; when he got on my car that night I asked him if he was not lost and he said no, that he had had some business up that way; then there was some other conversation between us; we were standing on the rear platform at

the time; he wore a high silk hat; my car left the depot that night at 21 minutes past seven; at 31 minutes past seven it was due at Master street; it was about half past seven when he got on; he rode down to his house with me; he stood on the platform until he reached Poplar street and then he went inside and took a seat; another incident that occurred that night refreshes my memory; that was an intoxicated woman who got into the car at Girard avenue; Hunter stayed in my car until I got to Wharton street; was due there at eight o'clock; when the car got there he bade me good night, left the car, and went to his house; am positive it was Hunter and am also positive as to the night and the time.

Mr. Robeson. Are you mistaken in the man? No, sir; have been a conductor on the road for five years; first spoke about seeing Mr. Hunter on the night of the murder shortly after the crime was committed.

Cross-examined. I did not see Hunter on the car on the night preceding the murder nor on the day following it; was never approached about this matter; came to Camden to see Mr. Hunter in relation to it about a month after the murder; spoke about it first two or three weeks previously but can not remember to whom I mentioned it; don't remember the names of any other persons on the car with Hunter; made ten trips on the day of the murder, but don't remember anybody but Hunter who rode with me on that day; recollect having seen Hunter at that time as soon as I heard of his arrest; never had

any dealings with Hunter; never visited him at his house; he has given me no money nor promised any; when I went to Camden to see Mr. Hunter I did not succeed and then went to see Mr. Scovel, one of his counsel, about it; Mr. Scovel was not in; on the down trip on the night of the murder I had about 50 passengers; had the conversation with Hunter while he was standing on the platform; can not recall any other evening when Hunter rode on my car; don't know whether any other passengers left the car when Hunter got off; had no conversation with anybody else on that trip. First learned of the murder in the *Times*, the day after. Am as sure of that as of anything I have sworn to. (The witness subsequently admitted he was mistaken as to this.)

Martin Royer. Am employed by W. F. Potts, Son & Co., dealers in iron and steel, as shipping clerk; have been with them since 1860; have known Mr. Hunter by sight for nearly 18 years; remember the night of January 23; rode down home on a Tenth street car that night; got in the car at 25 N. Tenth street; the car was pretty well crowded; got into it about half past seven or a little later or a little earlier; when several people got off and the car was less crowded I looked toward the front and saw Hunter sitting near the door; this was in the neighborhood of Walnut street; didn't see him when I first got in; rode down as far as Reed street and remember distinctly seeing Hunter get out at Wharton street; know it was on the night of the 23d because I

was an hour or an hour and a half later going home on that occasion than usual; can not remember what kind of a hat he had on, but if he had been wearing any other than a high hat I should probably have noticed it.

James Smith. Live at 233 S. Front street, Philadelphia; am an oyster dealer and have been so for eight years; know Thomas Graham; heard him have a conversation with Mr. Kelly at Pier No. 16 about the time the Shafer or huckster carts came in; Graham asked Kelly to go and get a drink; Kelly said, "You've got enough"; Graham then said there was something troubling him—"they're after me for the Armstrong murder, they have Hunter arrested; he has plenty of money and I'll put it on him." I sell oysters to hucksters or whoever will buy them.

Cross-examined. Am 36 years and unmarried; sell oysters for George W. Murphy, John McCabe, Arthur Painter, and others; don't know that Arthur Painter is a thief or that his father is; am known over town as "Blackjack Jim"; have been in the county prison three or four times for assault and battery; two were for three months each and one for six months; don't know that Thomas Kelly has ever been in prison; this conversation was about the 1st of March, when the Chesapeake oysters come in; perhaps it was before eleven o'clock in the day; Kelly, Graham, and myself were the only persons present during that conversation; mentioned it to Captain Murphy after the confession was made; spoke of it because Graham was arrested;

the conversation took place two or three weeks before he was arrested; suppose I mentioned it to several people, but do not now remember whom; the reason why I came here was someone came to me—I think his name was Charles Hazlet—and asked me if I would go to Mr. Scovel's office; said I would; have not been paid anything for coming here and am not to be paid anything; at the place where I have a room Doc Woodford, Sam Phillips, and other thieves have called there often; it is Mrs. Zernt's boarding house; no New York thieves come there that I know of; Captain Yoder and I are old friends; we have been political friends for about 12 years; the reason why I have been called "Blackjack Jim" was because when I was attacked by a man some 15 years ago I retaliated.

Theodore Schuyler. Know Tom Graham; met him in January last; he said, "They are after me for the Armstrong murder, but have arrested a man with whom I am well acquainted, named Hunter; he has plenty of money and I'll put it on him." This conversation occurred at the Jarmon house; have never been convicted for anything; Graham's reputation is not good; made a statement to Mr. Robeson about this matter; Graham has been associated with me; I expect to get my witness fees for coming here; wouldn't believe Graham under oath unless I knew what he was stating was true.

Cross-examined. Was not in Camden yesterday with Blackjack Jim; that is as true as anything I have said; was not arrested recently for stealing a coat;

guess Yoder is mistaken if he thinks I am the man; don't know how long Graham had been dealing in oysters at that time; that's a sort of conversation that one is not likely to forget; don't recollect the exact day or date when it occurred; told it to George Moore, an oyster man, and to a great many more; can't mention any others particularly to whom I told it; was subpoenaed to come here and don't know by whom; did not tell this to Blackjack Jim until last week; didn't know that he was coming here or think that I was coming here.

William Smith. Reside at 929 S. Fourth street; have lived there twenty years; was three years and three months in the Union army; was wounded and taken prisoner and have followed the water since as a steward; have known Thomas Graham for a year and a half; when he huckstered he became a drinking man; he used to sleep out all night with a gang in a frame stable on Marriott street, between Third and Fourth streets; he kept this up at times during the summer for three months, sleeping out all night; don't of my own knowledge know of Graham being indicted for burglary together with Curley Franks; would not believe him under oath; my brother-in-law, Robert Hamilton, keeps an eating house and for him I have done cooking; was indicted for attempting to kill United States Revenue Officer Brooks; was tried and acquitted.

Cross-examined. It was a young man, dark complexioned, who first came to me about this

case and brought me to Mr. Scovel's office; he might have been an office boy from Mr. Scovel; didn't come over with Blackjack Jim and have never been in his company; when I was brought to see Mr. Scovel I stayed all night in Camden; he told me to do so and that he would pay for my lodging that night; am not in any business now but am looking for work; don't remember what night it was on which I stayed here; was at Mr. Scovel's office yesterday; saw "Rocks" there, and he's there whenever I go; no promises have been made to me for coming here to testify; have never been indicted; two young men were with me when they brought me to Scovel's office; I told them all I knew about the case; neither they nor anybody else offered me any inducement to testify here.

Thomas A. Barlow testified to the general bad reputation of Graham.

Charles Muirhead. Made a valuation of Hunter's property and real estate and valued it at the present time at \$33,050, and that is very low; have made a search to find whether Hunter has any real estate; I know that it is in the name of John C. Hunter; don't know that his wife was a Miss Getz or that she inherited property; there is an incumbrance of \$3,000 on the residence in S. Tenth street; last January was a ruinous time in which to sell property; property out there is heavily taxed; consider the valuation I made as a very, very low one; the houses are all in good order and well rented, except one small property; the rental aggregated \$2180

yearly, and the taxes would amount to \$501; that includes the taxes, etc., on his own property; there is another mortgage, but the entire incumbrances don't amount to much over \$4100.

Mrs. Abels. Am a seamstress; made the cape spoken of belonging to Hunter's overcoat into an English walking jacket for Mrs. Hunter about five years ago.

John Holton. Have tested the possibility of a man recognizing another from the features from the door of the cabin to the chain on the bow of the boat, by the lamp in front of the engineer's room. It could not be done.

C. C. Cooper. Have lived in and about Philadelphia all my life; know Benjamin Hunter; have known him some years; his reputation for peace, quietness, honesty, and gentleness of character is of the very best; have never heard of anything against him before.

Richardson L. Nicholson. Have done business in Philadelphia 35 years; have done business with Benjamin Hunter; have known him 25 years; his reputation is of the very best.

Thomas B. Curley. I started from Camden 19 minutes after five; arrived at Front and Market at 5:25½; took a Union line car; arrived at Ninth and Spring Garden at 17 minutes of six; it took three minutes to go from Ninth and Spring Garden to Seventh and Spring Garden; arrived at Tenth and Columbia avenue at six o'clock exactly, making 34 minutes to go from Front and Market, Philadelphia, to Tenth and Columbia avenue; it took 41½ minutes to go from the Camden side to Tenth and

Columbia avenue; took Tenth and Eleventh street car down, jumping on the Tenth street car at Columbia at six o'clock; it took 32 minutes exactly to go to Mr. Hunter's house at Tenth and Wharton.

R. S. Belisle. Went over the route from the ferry house at the foot of Market street to Montgomery avenue; started from inside the ferry house, upper side, $3\frac{1}{2}$ minutes to eight o'clock; it took me $1\frac{1}{2}$ minutes to go up to Front and Market streets; there took the Market street line to Eleventh and Market streets; it took me $10\frac{1}{2}$ minutes to go there; had started at 2 minutes of eight o'clock and arrived at $8\frac{1}{2}$ minutes after eight; then took the Eleventh street car at $12\frac{1}{2}$ minutes after eight; arrived at Eleventh and Oxford at $29\frac{1}{2}$ minutes after eight; at Eleventh street and Columbia avenue at half past eight precisely; at Eleventh and Montgomery avenue at $31\frac{1}{2}$ minutes past eight; then I got out of car and walked down Montgomery avenue to Tenth street, which occupied 1 minute; then got the Tenth street car at Tenth and Montgomery avenue at 23 minutes to nine; arrived at Columbia avenue at 22 minutes to nine; arrived at Oxford street at 20 minutes to nine; arrived at Jefferson street at 19 minutes to nine; at Market street at 4 minutes to nine o'clock. To go to Tenth and Jefferson streets took 29 minutes; to Oxford street 30 minutes; to Columbia avenue $30\frac{1}{2}$ minutes.

George R. Leap. Resided in Camden six years; am the brother-in-law of Joseph Norris; lived with him when Davis and

Demaris and Hunter were arrested; have heard Moore talk about the occurrence; have heard it while eating our meals.

John Allen. Reside in Philadelphia; am a pork packer; know Thomas Graham; he was employed by me; I discharged him; was dissatisfied at some things that occurred in the place, and three or four were discharged at the same time; have not heard that his reputation was questioned; his discharge was only on suspicion.

Benjamin M. Becker. Have made experiments of recognizing persons on the ferry boat on a clear night, but was unable to do so.

General George B. Corse. At the request of Mr. Robeson I made experiments on boats; I crossed at one-quarter before 8 o'clock; found it impossible to recognize a man at the chains from the door of the cabin; also walked down from Eighth and Sansom in 15 minutes; the car started 3 minutes after the boat arrived; arrived at Second and Vine in 11 minutes; it took me 5 minutes to walk to Sixth and Vine.

Ed. Thompson. Am in the heater and range business; discharged Thomas Graham from my employ; he had worked for me; would not believe Thomas Graham on oath; his reputation is said to be very bad.

Cross-examined. Know Benjamin Hunter by sight only; Thomas Graham worked for me a little over two years; he had repaired heaters and drums for me; suspicioned him of dishonesty and discharged him; I told Mr. Scovel of this.

Thomas Armitage. Am the superintendent of Independence Square; I have a plan of it with me (plan shown); it was impossible for any person to walk across the center circle without climbing over the wire; there are eight posts sticking up with wire running around the circle, making a fence; there are roads around the circle.

Daniel Johntry. Am a police officer in the city of Camden; Mr. Mortland told me about the man with a fur cap on the next day or the day after he went on his car; went to him and asked him if he had seen anybody answering to Armstrong in his car; he said there were four or five got off at Second and Vine streets.

Benjamin F. Hunter. I am the accused in this case; will be 54 years shortly; have lived in Philadelphia all my life; my business was a manufacturer of heaters and ranges; was in it about 24 years; learned my trade with the firm of Morris, Tasker & Morris; after that I started business at 233 S. Tenth street; continued it there about 24 years; am the inventor of a patent boiler and own the patent; receive a royalty of \$1 on each boiler; I lived at 1304 S. Tenth street; I knew John Armstrong very well; became acquainted with him 15 years ago; he was a music typographer and electro plater; was his silent partner for four years; it ceased on the 1st of June last; \$5,000 I put into it and borrowed \$3,000 on my house to make it up; I merely took his notes for the money he owed me and felt perfectly safe in doing that; there were eight notes, five of

them I had, two of them were my wife's; have had my memory considerably shattered since I have been here and, of course, cannot just now remember all distinctly. I identify three notes, each dated June 1, 1877, at two, three, and four years, for \$1,000 each, payable to Benjamin Hunter semiannually, with interest, by John M. Armstrong. The first note is dated Philadelphia, June 1, 1877, for \$523, and is signed "John M. Armstrong." I took that about the same time to get him out of a difficulty. Another note is for \$523, dated July 5, from John M. Armstrong to Benjamin Hunter. Those five notes of \$1,000 each represented my capital in the concern; the other notes were for money I loaned to him to help him in the business; after having dissolved with Armstrong I made no arrangements about these notes; I visited him regularly and he often visited me; he lived near me for a long time, on Tenth street; I hold some life insurance—three policies—on his life; one is in the Provident Life & Trust Co. of Philadelphia, for \$10,000, payable directly to me; it is what is known as an endowment policy; one is of the Manhattan Life Insurance Co., for \$6,000; that is a life policy; it was issued to John M. Armstrong and transferred to me; and another in the Mutual Life Insurance Co. of New York, for \$10,000, payable to John M. Armstrong or his heirs and transferred to me. I secured these life insurances. At an interview with Armstrong at his office I said, "You are now in my debt; I have no security, and if you

should die I would lose all; I think you should have yourself insured and transferred to me, so as to make me secure." He was willing, and some days afterward I went to the Manhattan office on Walnut street, between Fourth and Fifth, where they treated me very courteously; I told him of the result of my inquiries and that I wished to insure him for \$6,000, because in the event of my death all of my creditors might come in. He said to me, "Mr. Hunter, for your kindness to me and my family I will not let you stick." I then went to the Mutual office and, after inquiries there, returned to Armstrong's office; he was not in and I took up one of his bill-heads, on which I wrote:

"Mr. Armstrong. Dear Sir: Please call at the Manhattan and the Mutual offices. Please leave off your truss for fear that they may not insure you. B. H."

I knew he was slightly ruptured; very slightly; not to affect him in the least, not even in swimming or playing hide and whoop or anything else.

I called afterward on the Provident, and there they treated me kindly, too. Armstrong had the examination, etc., made; all that I did was to make the inquiries, give his name, etc. If I am not mistaken, those policies were left in Armstrong's fire-proof safe for several days; after I procured these life insurances I saw Armstrong; I saw him a day or so afterward; my boiler was on sale at Hughes'; I was attending to my business; sometimes I did not see him for a week or ten days; don't think I saw him the week I went to Virginia; can't

give the date, but it was on a Friday, a week and three or four days before Armstrong was killed; returned on a Saturday and saw him on a Tuesday or Wednesday previous to the assassination; on Monday I went with him to the Farmers' Market to see Mr. Davis' partner; he wanted me to go there before I went to Virginia, but I said I would when I returned; it was to make my word good that I went; did not hear what Demaris said; he was shifting barrels and boxes about; don't remember whether I was at Armstrong's office on Tuesday; am not sure; was there on Wednesday about 10 a. m.; had a conversation about meeting next day at the bankrupt sale of his brother, Philip, at the Thomas auction store; he did not say anything to me about his affairs with Davis in Camden; there was no talk about anybody having anything in bank; I merely said to him to go to Philip Armstrong's sale, as I had promised to go and I would be there; did not make any engagement to come to Camden, nor would I come; he was a little deaf and oftentimes misunderstood me, sometimes saying "yes" to me when he ought to have said "no." Left his office at about eleven for home to dinner; in the afternoon went to Hughes' place; did not go to Camden that day or that evening; have not been in Camden for a year; stayed at Hughes' till about 5:25 and then walked to Mr. Epp's, 1721 Oxford street, getting there about six, in response to a note I had received from him; found it in a letter box at Hughes' before I went to Armstrong's on Wednesday.

Mr. Robeson. I offer this letter in evidence.

Mr. R. S. Jenkins. I object to it on the ground that the defense must bring Mr. Epp here himself. As it is, it is in the nature of hearsay evidence. Mr. Epp must be brought here to testify in regard to it, as the witness has stated the fact that he received a note from Mr. Epp.

JUDGE WOODHULL. This will answer very well as a memorandum to the witness by which to refresh his memory, but there has been nothing shown as yet to make it evidence.

Mr. Robeson. The witness identifies the handwriting.

JUDGE WOODHULL. But that does not prove the state of facts shown in the letter.

Mr. Robeson. We do not offer it for that purpose. We offer it to show that the witness had an appointment and kept it.

Mr. Robeson. What was your appointment about? In regard to my patent boiler. He wanted to know about the workings of my boiler that was made with a flat face and not a water-back face. He had never tried the flat face. The flat face goes against the water brick and the water-back face comes immediately in contact with the fire.

Mr. Robeson. Look at that letter and tell me what day it was. That was Wednesday, previous to the assassination. What was the day of the month? January 23, 1878. You went up there—what then? I found him at home, down in his workshop. Where is his workshop? Under his store. Where is his store? 1721 Oxford street, on the corner of an inner street. You do not remember the name of the street?

No, sir; I very seldom go up that way. How long were you there? I suppose I was there three-quarters of an hour, anyway; about three-quarters of an hour, I suppose. Where did you go after that? I walked down Oxford street to Broad and from Broad to Tenth—by the by, though, I was stopped at Broad street a little while by a gentleman in his buggy who had lost a pin out the eye of the shaft, and I held his horse while he went to purchase a bit of clothes line or something like that to help him lash it up; I held the horse and helped him while he lashed; he had a lady in the buggy with him. Did you know the gentleman? No, sir. Nor the lady? No, sir; neither of them; I went down to Tenth street. Did you see anybody there? While I was waiting for a car there was a lady came and she said she knew me, but I did not know her, and she asked me something about the cars—I think from Ninth and Green, or something like that. You do not remember particularly? I don't remember particularly; I think I asked her whether I should accompany her there, or something of the kind, but she said "No"; I don't know who she was; I would not know her, I suppose, again; and then the car that I came down on was in sight. What did you do then? I got in the car. Where? At Tenth and Oxford, not at Jefferson, as Mr. Young said; I got on at Tenth and Oxford. Where did you get off? I got off at my home, Tenth and Wharton. What time, about, or do you not know? Somewhere about eight o'clock, I think; I think I heard my folks

say "10 minutes of eight," about there; whether our clock was right or not, that I cannot say. The clock in the dining room is a little out of order, is it not? Yes, sir; very often, and the one in the kitchen, too. What time did you get on the car at Tenth and Oxford? Somewhere, I think, in the neighborhood of half past seven o'clock, I should think from the time that I was along there; it might not have been so late as that; I won't be positive. Did you have any conversation with the conductor of the car? Yes, sir; some little conversation; I don't know the gentleman particularly at all; I knew him merely by his being a conductor and I said, "Good evening" as I got on the car, and I think I asked him how he did or something of that kind; he said he was very well, only he was disappointed about going to his lodge, I think. You heard his story as he told it on the stand? Yes, sir; I heard his story, but I didn't bother my head much about it. It brings it back more freshly to your mind? Yes, sir; but I don't know how; I didn't bother my head about it. You had ridden on this car often before? Yes, sir; many a time. When you first got on the car, on what part of the car were you? I stood on the platform alongside of him. Are you an Odd Fellow yourself? Yes, sir; my lodge is No. 113, Oriental lodge, and I have been ever since I was

21 years of age. And that gave you some interest in his conversation? Well, I don't know that it did; I generally like to make myself agreeable when I meet company.

Mr. Robeson. You came home then; what did you do when you got home? I took off my coat and hat and eat my supper, and after that I found there was no *Ledger*; it had been, as I thought, blown away or stolen, and I went to Mr. Ernest to borrow his *Ledger*.

What did you do then after you got through reading the *Ledger*? I think I retired to my bed. I don't remember the particulars. I am not in the habit of sitting up late; never later than 10 o'clock.

Hunter. I first heard of the attack on Mr. Armstrong from his son Frank at my house Thursday morning. He asked me if I was in Camden. I said, No. He said his father said I was going with him there and he intimated that I would have to locate myself. Later Mr. Lorrilliere came in and I told him I was sorry to hear about Mr. Armstrong and that he had said I was going over there with him that night. Mr. L. replied that it was not unusual for Mr. A. to tell a story. My wife did not burst into tears and say: "Oh, Papa;" after breakfast I called at Mr. Hughes and then at Mr. Epp's, and took him to Armstrong's house.

Mr. R. S. Jenkins. We do not want the conversation that occurred there.

Mr. Robeson. We desire to offer it.

JUDGE WOODHULL. It is competent for you to prove the fact that Mr. Epp went there, and also what was done there upon that

occasion; but, of course, what he there stated is not competent, as it would be only hearsay evidence.

Mr. Robeson. We offer to prove that there, at the house of the man that was murdered, Mr. Epp, in the presence of the family, located Mr. Hunter on the evening of the occurrence and for that purpose.

Mr. R. S. Jenkins. That is as far as you can go.

Mr. Robeson. We propose to prove that he did there locate the defendant, and also what he said in the presence of the family.

JUDGE WOODHULL. That would be hearsay evidence.

Mr. Robeson. It is not a point which I care to argue at length to your Honor because it is a point which rests upon such narrow grounds that I do not care to press it, though I would like to save it for the sake of any benefit which the defendant might derive from it.

JUDGE WOODHULL. I do not see how there can be any difficulty in regard to the offer. It has not been suggested that Mr. Epp can not be procured as a witness or that he is even dead.

Mr. Robeson. No, sir; we have not suggested that. He is not dead that we know of, but we know that we cannot reach him.

JUDGE WOODHULL. As the matter now stands, what Mr. Epp said on that occasion is, I think, pure hearsay evidence, and is within the rule which excludes such testimony.

Mr. Robeson. We can prove that we subpoenaed Mr. Epp, and that he refused to come, and that he is out of the jurisdiction of the Court.

Mr. R. S. Jenkins. Your Honor will see how wide the door will be opened if this offer of the defendant is admitted. We are able to prove that Mr. Epp had made affidavits containing statements entirely different from those which the counsel now allege, and which we are able to produce here in court.

Mr. Robeson. That clearly would not be evidence. I am not denying that Mr. Epp has not stated otherwise, but I am now merely endeavoring to make this particular declaration competent evidence.

Mr. R. S. Jenkins. I know what you are trying to do; that is very plain. We object to it on the ground that it is hearsay testimony.

JUDGE WOODHULL. The rule is that the best evidence must be given if it can be procured, but if it is impossible to obtain the best then other evidence may be deemed competent.

Mr. R. S. Jenkins. The rule is that hearsay evidence should not be admitted except it is of a certain character, and in this case it is not of that character but is merely hearsay evidence, which should not be admitted. The rule in regard to the admission of this evidence is simply this: If one statement of Mr. Epp is admitted in evidence then other statements which he has made in regard to this matter will have to be admitted, and that will be opening the door very wide indeed.

JUDGE WOODHULL. Of course, if one statement is admitted other statements which Epp may have made will have to be admitted. If, therefore, he has made a statement contrary to the one now referred to it will also have to be admitted.

Mr. R. S. Jenkins. Then if the Court so rules we have no objection to this testimony.

Mr. Robeson. We do not intend to admit that any statement Mr. Epp may have made to the prosecutor or a statement to the effect that he is not certain as to the day is competent testimony.

JUDGE WOODHULL. If the statement which is now referred to is admitted and Mr. Epp has made any statements inconsistent therewith, they will have to be admitted in evidence on the part of the prosecution.

Mr. R. S. Jenkins. Then we withdraw our objection.

JUDGE WOODHULL. A different rule would make a mere statement conclusive evidence of the fact stated.

Mr. Robeson. We do not offer it for that purpose. We offer to prove that Mr. Epp went to the residence of Mr. Armstrong in company with the defendant, and that he there located the defendant in the presence of the family of Mr. Armstrong. We also offer it as part of the *res gestae*, and as a fact occurring within a few hours of the murder in response to a demand on the part of the murdered man's son, Frank Armstrong.

JUDGE WOODHULL. What do you mean by locating the defendant? That Mr. Epp went to Mr. Armstrong's residence and there said that a certain time the defendant was at his place. That is nothing but hearsay evidence and I do not see how you can make anything else out of it.

Mr. Robeson. That is the reason I have not argued it.

JUDGE WOODHULL. You may show by the defendant that Mr. Epp was there at Mr. Armstrong's residence for the purpose of locating him, and you may show that members of the family expressed themselves as being satisfied, but what Mr. Epp said upon that occasion is clearly inadmissible.

Mr. Robeson. Well, we will let that go.

Hunter. That afternoon I was at Armstrong's in his room with the doctor. The girl brought up some clean towels and I put one on his forehead. Know Thomas Graham; have known him nearly from his youth up; he was an apprentice of mine; lived with his mother in my neighborhood within a couple of doors of Mr. Armstrong; he knew him as well as I knew him, I suppose. I never met him in the street and called him.

up an alley and said to him: "Armstrong's got to be killed and you have got to do it;" positively no, sir, I did not; did not meet him on a winter's morning and say anything like it to him; don't know of such an alley; never met him before or about New Year's Eve, and never gave him a hammer tied up in a paper, and said "that's what it's got to be done with;" I never met him afterward and never gave him a hatchet (ham-

mer and hatchet produced and handed to prisoner); I never saw them before I saw them here; never gave them to Graham; he never lived in my family; never knew him as eating a meal in my family; always knew him as a good boy and did not know of his carrying on as he has been represented here; he called on me one day at my back gate and said he was in a desperate state; was about to be ejected from his boarding house, and asked me for assistance; I gave him five dollars; I saw him in Mr. Hughes' shop afterwards; never went to Mr. Ewell's house in my life and never said I had a job for him to do at night; it was not necessary for me to ask where he lived because I knew it. I called on his wife and she complained bitterly about him, saying that he never scarcely came home at night and that he was dissipated. I told her to send him to Mr. Hughes, to come sober, and I might get him a job there; at her request I called on him two or three times; I was not at his house on the Sunday after my return from Virginia. That morning I went to church with my wife; came home to dinner and stayed home until I went to my brother-in-law, Rev. S. A. K. Francis, for tea; I never asked Tom for a piece of paper or drew a plan of Vine street and Davis' house; did not see him after I came from Virginia until I saw him here in jail. I was with him when I bought that \$1 hat when I told the lady I was going ducking; took it with me and left it in the cars going to Washington. The Monday fol-

lowing the murder the Sheriff told me he would like me to go over to Camden to give evidence concerning it; that I would be brought back safely. I deny that I asked Graham to kill Mr. Armstrong; ever offered to pay him \$500 or had anything to do with the attack and assault on him, or ever told Graham that I had "finished" him. I had once an overcoat with a cape, but have not worn it for years. My income when I was arrested was about \$3600 a year; my rents \$2200; my wife's \$520; my daughter's \$513; my son's \$175. I never gave Graham a postal card addressed to Davis.

Cross-examined. I never saw Davis until I saw him here in court; never told Mr. A. that I saw murder in Davis' face. I did not get Graham a job; I wish I could, for he was a good workman. I tried to get Mr. Hughes to hire him but there was no vacancy. I went to Virginia to see my brothers and enjoy myself a little. I was not at Mrs. Ulrich's the three or four times that she and Mrs. Graham have testified to. I was quite amused with their story; am guardian for young Frank Getz; his share came due last January; I had not settled with him; owed him \$2000. The reason I changed the towel on Mr. Armstrong's head was that it was very much bloodstained and as the girl came up with the towels I said to her, says I: "I will put a clean towel on Mr. Armstrong's head."

Mr. R. S. Jenkins. Were you directed to do it? Not at all; no more than any of the others who were changing the towels and at-

tending to him. Had you seen anybody changing towels on his head? No, sir. Why did you interfere with it, then? Out of pure kindness; nothing else; I was doing all I could for him. How did the blood get on the towel which you put on his head? I presume it got on from the wound on his head. I do not know from what other source. Did you notice blood on the towel before Mrs. Smith came? I did not; I did not notice any blood on the towel before the girl came.

No, but the fresh towel which you put on. Did you notice whether the head was bleeding at the back when you put that towel on? Did you notice whether the blood got on the towel that you put on? Mrs. Smith called my attention to it. Exactly, but when you put on the towel did you notice any blood on it? No, sir; because the towel I put on was merely on his forehead. I merely laid it on his forehead. Did you notice any blood on the forehead? I did. On the towel that you put on? No, not that I put on—the towel I put on was a clean one. How did the spots of blood get on that towel? I presume it got there from the wounds on his head. I do not know of any other way. Did you notice blood on the towel you put on before Mrs. Smith came upstairs? There was no blood on the towel I put on; there was a spot on the towel I removed, that is all; but I ain't really positive. When Mrs. Smith came up was there any blood on the towel then which was on his head? Not that I remember. Did she not call your attention to it and did

she not say he was bleeding to death? Mrs. Smith removed the towel and then said to me: "He is bleeding again." "My," I think she said, "My, he is bleeding again, and we will have to send right away for the doctor, for the doctor left word that if he got to bleeding again we would have to send word for him immediately." Did you not hear Mrs. Smith's testimony to the effect that when she got to the door she saw two spots of blood on the towel and saw that the napkin had been taken away? Was that the towel that you found on his head? I heard Mrs. Smith's testimony as regards the towel. Was that the towel you put on his head that she saw the blood on? I do not know. Did you see any blood on that towel before she came into the room? The towel that was on his head? No, the towel that you put on his head? I do not know how any blood could get on the towel I put there. Did you see any blood on the towel that you put on his head before Mrs. Smith came into the room? I did not; not to my recollection; I was not so particular about that. What time did you leave that afternoon? About half-past 3 or 4 o'clock, maybe. Where did you go? I went up Broad street, I think to take a walk, that was all. When you went into the room that afternoon which we were talking about and saw Mrs. Smith, did you ask her whether Mr. Armstrong had been conscious and whether he had spoken at all? I don't know that I did, I can't remember. Did you ask Mrs. Armstrong? I can't remember. This Sunday of which you have

been speaking, the Sunday previous to the murder, when you were at church and at home all day. Do you know George Sprole? I don't know no such person. Did you not go to his house that same Sunday and inquire there for Mr. Thomas Graham? I don't know no such a person, nor did I go to his house. (George Sprole directed to stand up.) There is the gentleman standing up; did you not go to his house and inquire for Mr. Thomas Graham? I never saw the gentleman in my life. If he says so he lies, and I'll tell him so right to his face (to Mr. Sprole) You're a liar, sir.

Mr. Scovel (to the witness). Don't make these remarks.

Hunter. I won't stand here and allow no man to swear my

life away; I'll stand on my own ground, gentlemen. I don't wish to be offensive whatever. (To Mr. Sprole:) You're a nice specimen of a man; yes, that's what you are. I ask your pardon, Mr. Jenkins, if I said anything disagreeable.

Mr. Scovel. I will again ask the Court if these witnesses in rebuttal ought to be allowed to remain here. There is Mr. Sprole, and I suppose he will be called by the prosecution in rebuttal.

Mrs. Sarah E. Lott. Reside at No. 707 North 18th, Philadelphia; saw Hunter on the Tenth street car the night of the murder; saw him get off at his own house about 8 o'clock; he wore a silk hat. Saw a drunken woman in the car.

IN REBUTTAL.

Thomas W. Mooney. Live in Camden; timed the distance from Market street ferry to 10th and Oxford streets by riding in a coach, thence by car to Wharton down 10th street; it took me just forty-five minutes to make the trip, while it occupied only fifteen minutes from the ferry to

10th and Oxford streets by the carriage.

Mrs. Auvache. Live in Camden; saw Armstrong and Hunter come on the ferry boat that Wednesday evening and saw them get in the car on the Camden side. I had down in my diary the day I was on the ferry boat.

THE SPEECHES TO THE JURY.

MR. WILSON H. JENKINS, FOR THE STATE.

June 27.

Mr. Jenkins. May it please the Court and gentlemen of the jury: I congratulate you upon the near approach of the close of this long trial, and thank you all for the earnest and close attention you have given it. I know full well what a sacrifice it has entailed upon each of you—a sacrifice of time and comfort and business and pleasure, all of which cannot be properly

estimated, and I thoroughly understand how inadequate a compensation is provided by law for these sacrifices. And I am glad to be able to say that, from the outstart, you seem to have realized the responsible office to which you have been called. It is a responsibility which we all share alike—the Court, the counsel on both sides, the witnesses, and last, but not least, the officers who have been with you night and day during the progress of the trial.

None of us are responsible for what may happen as the consequence of our proceeding; but all of us are responsible that we do that part of it which falls to our lot faithfully, conscientiously, intelligently, fearlessly, and in accordance with a real conviction of duty. And when we have done all that, gentlemen, there is nothing which can attach to us of responsibility beyond.

It now devolves upon me to make the opening of the closing argument on behalf of the state. The indictment is based upon the sixty-eighth section of an act entitled “An act for the punishment of crime.” R. S. of 1874, p. 145.

It is the highest crime known to the law, which involves private injury. The indictment charges Benjamin Hunter with the murder of John M. Armstrong, on the 23d day of January last, by striking him on the head with a hammer or hatchet.

What is murder? It is the unlawful killing of a human being by a responsible being, with premeditated malice, either express or implied. That is to say, to constitute murder there must be a killing of some one; the person killing must be of sound mind, or in possession of their reason, and the act must be done with malice prepense, aforethought or premeditated, which malice may be implied or expressed.

You are relieved of one embarrassment which quite frequently attends this character of cases, and there is a degree of murder proved. It is often as difficult for a jury to determine the degree of murder as it is to determine the guilt or innocence of the defendant from the facts. This is murder perpetrated by lying in wait, and, therefore, cannot be any-

thing else than murder in the first degree under the laws of this state.

There are only two important questions for you to consider in order to arrive at a final conclusion in this case as to the guilt or innocence of the defendant. The first is: Did John M. Armstrong die from the blows he received on Vine street, in the city of Camden, on the 23d day of January last? And the second: Did the defendant at the bar, Benjamin Hunter, administer any of the blows, or was he present, aiding and abetting, and caused them to be administered?

As to the first question, did John M. Armstrong die from the blows he received on Vine street, in the city of Camden, on the 23d of January last? It is proper for me to say here that, in a case like this, where a man is charged with murder it is incumbent on the part of the state to prove to you, beyond any fair or reasonable doubt, what the law terms the "*corpus delicti*," that is, the body of the crime, the whole nature of the offense.

It is true that the learned counsel for the defense have said that it was no use shutting their eyes to the fact that John M. Armstrong came over to Camden on the night of the 23rd of January last, and the only question was, did Benjamin Hunter commit the crime? Still, this was not admitted until they saw that it had been clearly proved. It was a part of the state's opening that we would prove this, and I will show you that it has been done. We want them to admit nothing; all that we have asserted we will show you has been proved.

To substantiate this we must resort to the facts as sworn to by the witnesses. We first have the testimony of Frank Baker. The next witness called as to the finding of John M. Armstrong is John W. Julier. On cross-examination Julier said it was ten minutes to seven o'clock when we got the body to the drug store; Mr. Braddock looked at his watch in order to fix the time. The next witness called on the part of the state was Charles Fidell. So you see, gentlemen, that the testimony of Baker, Julier and Fidell corroborate each other exactly as to the principal facts. Now, from their evidence

combined, we learn that on the evening of the 23d of January last, at a quarter of five o'clock, an unknown man, a stranger, was found lying on his back on the pavement at No. 508 Vine street, in this city, in a pool of blood, unconscious, and apparently mortally wounded about the head; his cap, a hatchet and a hammer, with the letters "F. W. D." cut on the handles, lying by his side. The first impulse of these gentlemen was to take him and all they found with him to the nearest place where medical aid could be summoned. He was taken to Mr. Justice's drug store, on the southeast corner of Fifth and Elm streets, within four minutes after he was found. I mention the time because I will show you that it was done in that time.

The evidence showed the finding of the body, the administration of restoratives at the drug store, the recognition by young Armstrong of his prostrate father, and the conveyance of the almost lifeless man to his home in Philadelphia, followed by the operation of the physicians upon the wounds of the unfortunate man. In this regard it is clearly proved that this medical attendance lengthened the man's life, for had it not been for that he would have died even before he left Camden.

It has become quite fashionable for people in respectable life, with volumes of character testimony at hand, to commit the highest grades of crime, and I will cite the cases of Professor Webster,^a Twitchell, and Udderzook. Who committed this murder? Why, according to Mr. Scovel, Graham was the man who did it—"the pampered pet of the Daubman dynasty." Why, gentlemen, I don't know an officer who deserves more praise than Sheriff Daubman for his labors in this case. I expect the gentleman will fling a tirade of *blackguardism* upon Sheriff Daubman and upon Detective Yoder and all the officers of the state who have worked in this case; but, gentlemen, they did no more than their duty. I will show you that Graham is neither a vagabond nor a perjurer. But he is a murderer, and he admits that, and explains how he was lured into it by the more than fiend, the prisoner at the bar.

^a See 4 Am. St. Tr. 93.

Mr. Jenkins went over the confessions of *Graham*, as delivered by him upon the witness stand at the beginning of the trial. He referred to *Hunter's* first interview with *Graham*, and detailed the conversation which took place at that time; how *Hunter* broached the subject there and offered him \$500 to do the deed, the motive which the defendant held out and which led to the commission of the crime; how they met again at *Stiles' store* on Second street, where *Hunter* gave his accomplice a rough plan of the spot which he had chosen for the scene of the murder.

Then took place the conversation at *Hunter's* back gate, which *Hunter* admits. And do you remember what *Hunter* says. "He said to me, *Mr. Hunter*, I've had no luck since I left you; I am getting desperate." Do you think *Graham* ever told him that? *Hunter* also admits that at that time he gave him \$5. The next time *Graham* saw him was at *Hughes' store* on the Tuesday before the murder, when *Hunter* told him the deed had to be done that night, and gave him a postal card to post to *Ford W. Davis*. *Hunter* denies this emphatically, but the fact that he was there is corroborated by *Mr. Hughes*. He says *Hunter* came up and shook hands with *Graham* and then walked inside. Is not this just exactly what *Graham* says? *Mr. Hughes* tells you that he asked *Hunter* who *Graham* was and he said he was an old apprentice of his, and that was all he would say. *Hughes* could not get the name of the young man from the defendant.

Now, gentlemen, you remember from the testimony of the defendant he says before he went to Virginia he had an engagement with *Armstrong* to see *Demaris*, to make arrangements about a mortgage, and he was wanted as a witness there. He did not go before he went to Virginia, but after. He admits himself that he went to the Fifth Street Market about eleven o'clock in the morning of Wednesday, but heard nothing. *Demaris* says that *Armstrong* came to him and asked where *Davis* lived.

Then what did they want to know that for? *Hunter* said when first arrested that upon leaving *Demaris' stand* they went

back to Armstrong's store. He denies that in his testimony. What did he go back to Armstrong's office for? Why, to get the postal card from Armstrong that he might show it to Graham and let him know that Armstrong was going to Camden on Tuesday night. How did Graham know that that postal card ever existed? Ah, gentlemen, miracles like that are not worked out these days. Graham didn't go to Camden that night. Don't blame him for that. Oh, gentlemen, Graham's heart was true, and when he went to see Hunter at the drug store the next morning, he had to tell him a lie. This brings us to the next conversation between Graham and Hunter. He told Hunter that he was over there but Armstrong did not come, and Hunter said, "That's queer." It is also queer that Hunter was not there too. He had intended going with Armstrong on that Tuesday night. The letter from Armstrong to his wife proves that, and that was the night he had the alibi fixed for—that was the night he went up to see Peter Epp. Graham would not have known Armstrong was going to Camden that night if Hunter had not told him. There sits the man who told it; there was the man who knew; who had the object to gain; Graham bore no ill will against Armstrong; he had nothing to gain but the dollars which this man promised him. Hunter knew that people were acquainted with the character of the hat he wore in winter, and he knew he must make a change, so the first thing he did was to go down Passyunk avenue and buy a hat.

This evening, at Eighth and Sansom streets, Graham tells you Hunter handed him a hatchet; that it had a nick in it; he identified it when it was shown to him here by that nick. Why did Hunter give him that hatchet? He was afraid Graham might forget the hammer. Reaching this side of the river the two took a car, and Graham followed, running when the car went fast. They got out at Second and Vine streets and walked up to Fifth, and when they got to the alley, they stopped. Hunter went up the alley and when he came out he said, "Yes," and then it was that Graham hit Armstrong with the hammer, Graham ran, and when he met Hunter on the ferry boat he said "I finished him."

We have Hunter and Armstrong in a Camden car on that night. Is Graham corroborated in that? Mortland, the car conductor, says that on that Wednesday night he carried two men from the ferry slip to the corner of Second and Vine streets, and he describes the two men. He describes Hunter's hat, his coat, and the man himself, and says his companion was deaf, and when talking to him Hunter reached forward and spoke close to his ear; he also describes Armstrong by saying that he wore a fur cap and was not as tall as the other man.

Mr. Moore saw Hunter and Graham on their return from Camden. The defense may try to show that a man could not have seen faces in the position that Moore did, but the prosecution had proved that faces could be distinguished at that distance. Graham is corroborated by one of the witnesses, who heard the hatchet fall on the pavement, and heard someone run after it had fallen. Gentlemen, I have gone over the testimony of Graham and its corroboration, and from it but one inference can be drawn, and that is that it is perfectly true.

They will ask you what motive had Benjamin Hunter for committing the crime. There was a motive, and it was the \$26,000 insurance which he had obtained on Armstrong's life. This man was not in such a prosperous condition as his counsel would make you believe. He had an income really of only \$2,200, and when certain taxes, premiums, etc., were taken from that it amounted to probably not more than \$500, and on this he was keeping a wagon and horse and servants, living in a style which would rather require an income of \$3,000 than \$500.

He says that Armstrong knew how much insurance he was getting, and yet some of the evidence here would indicate that he did not know it. It was only three days after Armstrong's death that Hunter places the Manhattan policy in the hands of a lawyer for collection. So, I think, gentlemen, that we have shown a motive.

Under the rule governing such cases, the uncorroborated statement of an accomplice may be accepted as testimony.

Graham's story, even if unsubstantiated, should be given weight. No proof had been adduced that Graham was an unreliable man. They brought such men as Smith, the huckster, Blackjack Jim, and one Barlow to prove these things. They failed utterly in all they have undertaken.

Now, the defense has placed great faith in their ability to prove an alibi. The principal witness on the part of the defense to prove this alibi was Washington L. Young. Try and remember the law which has just been read to you, and apply it to the testimony of Young. He tells you he did not come over to see Hunter until one month after the murder; that he told what he knew not until three weeks after Mr. Hunter was arrested. Now, there's something queer about this man's testimony. A man, the law says, to resort to an alibi must set it up at once when he is arrested. Mr. Hunter, if it is a fact, must have known of the Tenth street car ride, and he could have procured Young at once. How easily he could have been mistaken in one month's time. He was mistaken. He was asked when he first heard of the murder, and he said he saw it in the Times the next morning. "Are you sure of it?" he was asked. "Yes, sir," he replied. "Are you as sure of it as of everything else you have sworn to here?" "Yes," he replied again. Here is the Times of Thursday, January 24. You will have an opportunity of examining it. It isn't there. The next day he was recalled, and he said he had made a mistake.

Gentlemen, I have now gone over the most important parts of the evidence, and have tried to present it to you fairly and in accordance with the true intent and meaning. The able prosecutor of the pleas will make the closing arguments on the part of the State, and, with a few remarks, I will leave the case with you.

It would seem, under other circumstances, almost inhuman did you not sympathize with the widow, with the orphans and the home which has been rendered desolate by the assassination of a good, true, and faithful husband and father; and, on the other hand, no consideration of pity or mercy toward the

defendant should be allowed to influence you for one second.

If the facts satisfy you of the defendant's guilt, there is but one alternative, and that is to convict him. To the tender appeal made to your sympathies by the presence of his wife and children you must turn a deaf ear; to listen to them would be more than a mistake; it would be a crime—a crime against the innocent, against yourselves, and against society.

You are not, gentlemen, to consider the consequences that may attend conviction; that is the duty of the court. We each have mapped out for us a separate duty to perform. Do it conscientiously, do it fearlessly, without regard to favor or prejudice, forgetting everything but the law and the evidence.

After all this is done, and your final conclusion is reached, let each one of you be able to say

I feel within me
A peace above all earthly dignities,
A still and quiet conscience.

MR. SCOVEL FOR THE PRISONER.

June 28.

Mr. Scovel. Gentlemen of the jury, I congratulate you that, while our duty to the defendant is almost done, that duty which to you is so serious, so solemn and solicitous—a duty so vast that it is almost appalling—now commands all the energies of your minds, your consciences, and your hearts.

And it is a pleasure to me to add that you will have not only such aid as counsel can give you, but you will be entitled to receive the guidance of the court on questions of law, and whom, in almost 25 years of practice at this bar, we have come to regard with affectionate respect, and to whom we accord that distinguished honor everywhere accorded to the just administration of the law.

If we live a thousand years, gentlemen of the jury, we will not forget this case. It is one of the most wonderful in the history of criminal jurisprudence. Remarkable for the character, the malignity of as kindless and treacherous a prosecution as ever disgraced the history of the insolence of office, or

the attempt of a colossal liar to fasten his own crime upon the head of a good citizen and a good man. It is a case, too, which crowds eternity into an hour and stretches an hour into eternity.

The first count in the indictment is totally defective on these grounds: That it does not show any jurisdiction in the court. The sixth count is good under the statute of 1874; this count, however, avers that the murdered man died in Camden, and there can be no conviction upon it. These two counts are, therefore, out entirely, and if Hunter could be convicted at all he must be convicted upon the four intermediate counts, which are substantially the same.

The third count avers that he died in the city of Philadelphia, in the State of Pennsylvania. It don't say that it is one of the States of the Union, or that it was out of the jurisdiction of this court. The statutes say it must be averred that the man died in some jurisdiction out of the State of New Jersey. The three other counts are substantially alike. They aver that he died in Philadelphia, out of the jurisdiction of the State of New Jersey. These counts, therefore, bring up the construction of the statutes. Although the court has refused to quash the indictment for the purposes of this trial, the matter is so serious that it should again be brought to the attention of this court, and the learned judge should be asked to charge that the indictment is bad, and there can be no conviction upon it.

In 31 Dutcher it is expressly ruled by the Supreme Court of New Jersey that the words "on the sea, or in places out of the jurisdiction of the State of New Jersey," mean the sea, the open sea, or waste land where no government exists that could try the defendant or had jurisdiction. This was the case where a man was wounded in New York and died in Jersey City. The Supreme Court said that the conviction in Jersey City was void. Now, if the Supreme Court meant that then, it meant the same thing in the next line of the same case.

The decision that the place of death must be averred is clear and indisputable; 2 Chitty's Pleadings says it is no

murder, and can not be murder, without a death; it is an essential fact, an ingredient of murder, and must be alleged to constitute murder, as must all those facts which are necessary to constitute murder, triable in this State. As the indictment now stands, at most, at common law, it would be assault and battery in New Jersey, with intent to kill. If it could be anything without the statute it is assault and battery with intent to kill. That is what it is without the statute.

If the statute holds, the words "City of Philadelphia, in the State of Pennsylvania," is within an organized jurisdiction, in the second State of the Union; a State with law officers and courts capable of trying all offenses within it; it is not a waste land, without power to try its own criminals, and, as the Supreme Court says, in that case, 3 Dutcher, that, if they could try a man in Jersey City for murder, then they could try any man who was killed in China and Japan, or anywhere else on the face of God's earth, simply because he came to New Jersey and died within a year from the felonious striking.

There are a number of cases of this kind in England where light is turned upon the New Jersey statutes. In one case a number of English sailors got into a fight in Newfoundland at a time when there was no organized government existing in that country. One of the men was killed; the sailors were taken to England and there tried for murder. It was considered at the time a great stretch of the existing law; it was then held that, there being no organized authority or power to try in Newfoundland, the home government would take the authority. (Bishop on Criminal Law and Criminal Proceedings.)

The statute of New Jersey is a transcript of the statutes of George III, and it was passed very shortly after the trial of the Newfoundland case, and was passed to meet that very case. The doctrine that the death must be within the country and, *a fortiori*, in the State, is laid down in the Rebecca Davis case, tried by ex-Attorney General Browning, where it was held that the county of Camden had no authority to try. The particular defect in that case was remedied by the passage at

that time of an act making the Delaware river front subject to the jurisdiction of the counties lying upon it.

The indictment, therefore, is bad upon the first and sixth counts; and as to the other counts, it is bad because it does not conform to the statutes, the construction of which has been passed upon by the Supreme Court of New Jersey, which holds clearly, undoubtedly, unequivocally that the words "sea, or any place not within the jurisdiction of this State," must be construed to mean waste places like the sea, where there is no constituted authority to try a defendant for murder.

In the case of La Pirardiere two maid servants swore that their master was killed by his wife and a priest, and that his dying words were, "Oh, my God, have mercy on me!" But Pirardiere was found alive and living with another woman, and after conviction he appeared, and a new trial was granted to the wife and priest. Here was flat perjury without motive. An equally celebrated case was that of Le Brun, valet of Lady Mazel, a woman of fashion in Paris. Lady Mazel was found dead in bed, with fifty stabs. The valet had borne a good character, but a large key was found on him which would open the outer doors. This circumstance hung him. The history of the case is as follows: Le Brun had nothing to oppose to these strong circumstances but a uniform good character, which he had maintained during 29 years he had served his lady, and that he was generally esteemed a good father and a good servant. It was, therefore, resolved to put him to the torture to make him confess his accomplices. This was done with such severity, on February 23, 1690, that he died the week after of the hurts he received, declaring his innocence with his dying breath. About a month after a notice was sent from the provost of Sens that a dealer in horses had lately set up there, by the name of John Courbet, but his true name was found to be Berry, and that he had been a footman in Paris. In consequence of this he was taken up, and the suspicion of his guilt was increased by his attempting to bribe the officers. On searching him a gold watch was found, which proved to

be Lady Mazel's. Being brought to Paris a person swore to seeing him go out of Lady Mazel's the night she was murdered and a barber swore to shaving him the next morning, who, on observing his hands very much scratched, Berry said he had been killing a cat. On these circumstances he was condemned to the torture and afterward to be broken alive on the wheel.

On being tortured he confessed that by the direction and order of Madam Savoniere (Lady Mazel's daughter) he and Le Brun undertook to rob and murder Lady Mazel, and that Le Brun murdered her while he stood at the door to prevent a surprise. In the truth of this declaration he persisted till he was brought to the place of execution, when, begging to speak with one of the judges, he recanted what he had said against Le Brun and Madam Savoniere, and confessed he came to Paris on a Wednesday before the murder was committed. On the Friday evening he went into the house unperceived and got into one of the lofts, where he lay until Sunday morning, subsisting on apples and bread which he had in his pockets; that, about 11 o'clock Sunday morning, when he knew the lady had gone to mass, he stole down to her chamber, and, the door being open, he tried to get under the bed, but it being too low, he returned to the loft, pulled off his coat and waistcoat, and returned to the chamber a second time in his shirt. He then got under the bed, where he continued until the afternoon when Lady Mazel went to church; that, knowing that she would not come back soon, he got from under the bed, and, being incommoded with his hat, he threw it under the bed, and made a cap of a napkin which lay in a chair, secured the bell strings, and then sat down by the fire, where he continued until he heard the coach drive in the court yard, when he again got under the bed, and remained there; that Lady Mazel, having been in bed about one hour, he got from under the bed and demanded her money. She began to cry out, and attempted to ring, upon which he stabbed her, and she resisting with all her strength, he repeated his stabs till she was dead; that he then took the key of the wardrobe cupboard from the bed's head, opened this cupboard, found the

key of the strong box, opened it and took out all the gold he could find, to the amount of six hundred livres; that he then locked the cupboard and replaced the key at the bed's head, threw his knife into the fire, took his hat from under the bed, left the napkin in it, took the key of the chamber out of the chair and let himself out, went to the loft, where he pulled off his shirt and cravat, and leaving them there put on his coat and waistcoat and stole softly down stairs and finding the street door only on the single lock he opened it, went out and left it open; that he had brought a rope ladder to let himself down from a window if he found the street door double locked, but finding it otherwise he left his ladder at the bottom of the stairs, where it was found. Thus was the veil removed from this deed of darkness, and all the circumstances which condemned Le Brun were accounted for consistently with his innocence. From the whole story the jury will perceive how fallible human reason is when applied to circumstances, and the humane will agree that in such cases even improbabilities ought to be admitted rather than a man should be condemned who may possibly be innocent.

We now come to the Graham confession, which Archbold says "must be obtained fairly and without any inducement. But it is only evidence against the party making it, and not against others."

Graham says he made the confession because he felt like it. The Teutonic Lancasterian Yoder thinks conscience did it.

This amorous and well-fed desperado, Graham (who roamed about the jail at his own sweet will, happy in the society of Emma Bethel, and last, but not least, in sweet converse almost daily with the man with the cast iron eye, the Camden sheriff, and his gentle kid, Edward Kennedy) tells us flippantly that he spent two hours over the first confession, reluctantly given us by Prosecutor Jenkins; that he made the bogus confession with Jenkins in front of him, Yoder on one side of him and the lamblike Mayor Ayers on the other. And "tell it not in Gath; publish it not in Askelon," the gentle Ayers tells us that the great Daubman—this new Javert in search

of a Jean Valjean, if he can manufacture one—that Daubman, the Lion of the Tribe of Yoder—slept. Yes! this happy combination of the sleuth hound and the Bengal tiger—in the presence of his first victim, with the first taste of blood in which he laps his tongue, like the wicked roll under their tongue a sweet morsel—slept. No fear tormented the sleeping sheriff's vision; that \$5,000, the blood money in this case, would slip from his all too eager grasp unless he could wrest a verdict of guilty out of twelve honest men against Benjamin Hunter. Yes! Peacefully Daubman slept—if we believe Ayers—and we don't. And would to God we could draw the curtain here a while from the gaze of honest men, the bitter and hellish plots, conspiracies and counter plots hatched in the brain of this spurious detective, aided by Yoder, in order to foist upon an eager and breathless community as true the feeble and vacillating utterances of this colossal liar Graham!

Mr. Jenkins, the young gentleman, seems to be in a chronic state of terror lest the defense shall pour out a torrent of abuse upon Yoder and Daubman. He accepts our name for the pampered pet of the Daubman dynasty, and in the same breath praises the sheriff of this county as an officer of this court for nearly a quarter of a century. I think I know a sheriff's duty—his duty is to draw the juries which try men charged with crime. He has the custody of the prisoner; but there are amenties belonging even to the insolence of office. And until a man is indicted and tried the sheriff is simply the guardian of the person of the prisoner, whom the law holds innocent till the jury have pronounced him guilty. And when the sheriff makes himself a public prosecutor, pursuing a defendant with sweltering venom, he degrades his office and disgraces himself.

My learned young friend, when he opened his case, opened himself. He says Graham's reputation is as good as his own! "*Pares cum paribus facillime congreganter.*" We would not call upon Governor Pollock to prove the character of "Black-jack Jim" or the huckster Graham. But we properly bring Barlow, Bob Hamilton's brother-in-law, Smith, and Blackjack

Jim to prove Graham's character, and by them we prove it. These were his companions. They knew that he occupied the Schaefer carts at night for three months at a time, in preference to going home to his family. And Smith says the gang was a bad one, and that Graham's character was as bad as the gang; so when Mr. Jenkins speaks of Graham's character as being as good as his own the young man forgets himself, and when he charges me with heaping invective upon Yoder and Daubman, I answer I have done so, because the words of common courtesy do not apply to their abuse of power or to the atrocious devices to which they have resorted in their unparalleled efforts to convict the prisoner at the bar.

I accept the law as stated in Wharton on Criminal Law, page 646; "But it behooves one charged with an atrocious crime like this of murder to prove a high character, and by strong evidence make it counterbalance a strong amount of proof on the part of the prosecution." No higher character was ever proved in a court of justice than we have proved for Benjamin Hunter by seventy-five of the best and foremost citizens of Philadelphia.

My young friend attacks Benjamin Lytell, says his testimony was not worthy of belief. If so, why did he not contradict it? This courthouse was filled with Daubman's parasites, ready to swear as their masters wished at fifty cents a day, paid out of the county's coffers. They are all dumb. The reason they did not call them is because they dare not. The character of "Rocks" will compare favorably with that of any man around the courthouse who has endeavored to hunt and hound Benjamin Hunter to the gallows tree. He was good enough, drunk or sober, to carry out the behests of the sheriff of Camden county till, to use his own classic words, he "set up a little job of his own" on Daubman. These words "Rocks" did not use in any offensive or corrupt sense. But he saw that Daubman, like De Quincey, had begun to treat "murder as a fine art."

From the hour the close-fisted agent of the insurance company, ashamed, had come to Camden intent on carrying Hunt-

er's scalp in his belt, like another Modoc, "Rocks" discovered that Daubman's new Hindoo idol (Graham) was a man to be studied. "Rocks" studied, not with any sinister purpose, but, believing that Graham was the deeply sinning dupe of a band of gamblers who were playing with Hunter's life like gamblers play with counters. "Rocks" believed, and still believes, Hunter to be innocent. "Rocks" had sinned but twice. First. In coming to Scovel's office. Second. In getting drunk. Well, as a school for morals the sheriff's office is a failure, and the difference between this prominent county official and "Rocks" is, that the latter sometimes gets drunk and the other man gets other people drunk. Ah! but "Rocks" knew Hagerman. Suppose he did. That does not affect his testimony. He knew the truth and he told it. *Hinc O? Daubman, illa Lachrymae?* When Graham said he "would never be hung" he had Ed. Kennedy's word for it and the high sheriff's. When Graham said "I will put Hunter away to save myself," the miserable tool of the "dynasty" was only doing what he had been told to do on the night of the star chamber inquisition at the prosecutor's house. So "Rocks" stands unimpeached. He proves Graham's confession, instead of being pure and trustworthy, to be corrupt, dishonest, devilish and damnable, so tainted with crime and general rottenness that twelve honest men in this jury box will trample it into the dust with unmitigated scorn and execration—a loathsome thing as was ever uttered since Judas Iscariot betrayed the Saviour of mankind and then went out and hanged himself!

But then comes Emma Bethel, twice tried for murder, says the gentle prosecutor's assistant. Aye, and twice acquitted. Her word is at any time better than that of a self-confessed murderer. What does she say? "Corroborate" means to make strong. Does she strengthen Graham's testimony? and without this the case is full of rottenness and dead men's bones. Ah! no. She says Graham well knew that the prison gates—as was solemnly promised him—were to fly open, and he to escape as the price of his infamy in answering the cor-

rupt behests of Yoder and Daubman and Ashmead and the palatial Shepley, who will soon sit in his marble palace of polished stone running from Chestnut all the way through to North Fourth street, in the city of Philadelphia, looking for other victims to hang when their attorneys call for the amount due on policies of insurance.

Let my young friend not worry so much about Epp, or what he calls an imperfect alibi. The issue for him to make clear to this jury—and he has signally failed in doing it—is whether Graham's testimony, interpreted on the broad and humane principles of the evidence, founded on the charities of religion, the common experience of life and the truths of philosophy, is sufficient to convict anybody.

When he asks us for Epp—we answer, Where is Sprole? Where are the witnesses who were to show that Benjamin Hunter was in embarrassed circumstances? The evidence proves that he had a clear income of \$2200 per annum, and with his wife's income and his children's was worth \$3500 and more a year. Men do not usually kill their debtors who have a chance to repay them as Armstrong had a chance to repay and was every week repaying Hunter. The motive was far stronger in others to kill Armstrong than it was in Hunter, because other parties, as testified to by Mr. George Carr, were pursued with criminal charges by Armstrong, and the motive was strong in these people to get rid of the man whom they could never hope to pay.

As to the testimony of Moore and the woman Auvache, it is not worthy of belief. The woman could not tell whether she was married a second time, and she came on the stand smirking and went off winking at the district attorney. When this woman, who bought one diary in seven years, only to put down one fact in all the seven years, viz., that she went to Philadelphia on the 23d of January in the evening, when she pretends to have seen both Hunter and Armstrong, on a dark night, and never having seen them before, recognizes them both, she lies with as much ease as Moore, the plasterer, who had better put a plaster over his own mouth before he swore

that he met Hunter on the boat—never met him before—knew him—saw Mr. Scovel frequently, but never told him or anybody else about it for four months, and not till the Thursday before the trial.

It would be charity to drop a mantle over the perjury of both those witnesses, Moore and the wet nurse Auvache, or charge them to the account of Detective Yoder, who belongs, I very much fear, to that class of detectives who when called on to produce evidence produce it as desired, and if the real facts do not sustain the evidence desired so much the worse for the facts. And to use the classic language of my young friend Jenkins, Jr., if Moore and Auvache have not sufficiently purged themselves they had better purge themselves with hellebore, as the ancients did. They need fumigating or embalming, for, like Lazarus, they are dead four days already, and by this time their evidence stinketh.

But my classic friend is still unsatisfied with the alibi proved by Washington L. Young, and he opens the feeble floodgate of his youthful Billingsgate, and asks him why he did not come to the front sooner. Oh, disingenuous Mr. Jenkins.

You now say that the principal witness on the part of the defense to prove this alibi was Washington L. Young. Try and remember the law which has been read to you, and apply it to the testimony of Young. He tells you he did not come over to see Hunter until one month after the murder; that he told what he knew not until three weeks after Mr. Hunter was arrested; that there's something queer about this man's testimony; that a man, the law said, to resort to an alibi must set it up at once when he is arrested; that Mr. Hunter, if it is a fact, must have known of the Tenth street car ride, and he could have procured Young at once.

And yet three months ago the name of Mr. Young was given you and for ninety days you have threatened to eviscerate or disembowel this witness for the defense, and when we offer to support him by Charles A. Miller, son of the celebrated detective in Mr. Hagert's office, you decline to attack him; and,

why? Because his testimony is as strong as the moral law or the law of the Ten Commandments. Mrs. Lott, a respectable lady, against whom no single word of reproach is breathed sustains Mr. Young by saying she saw the drunken woman in the car and came down in the half-past-7 p. m. car from Oxford street and went up to Benjamin Hunter's door and there saw him with his high silk hat on. This story is corroborated by Hunter's four children, and your only protest to it is that it looks like there "was something queer in this man's testimony," because an alibi ought to be set up when a man is arrested. I had been laboring under the impression that the time to prove an alibi was when the thunderbolts of the prosecution were launched at the head of Benjamin Hunter in open court. There we have met our adversaries. There were submitted in our opening nine propositions that we would prove the innocence of Benjamin Hunter. We have done so. We did not wait for the State to establish the guilt of the prisoner at the bar, because we well knew they could not do it. We show that Benjamin Hunter was from 6 o'clock to 7 at the house of Peter Epp, and we produce Peter Epp's letter to Benjamin Hunter asking him to come on that day.

If Epp is not here it is because Jenkins and Daubman, the David and Jonathan of the prosecution—as "devilishly sly," as Joey Bagstock, and with the cunning of Jacques Strop and Robert Macaire—they have haunted the humble abode of Peter Epp till they have frightened the honest German till he fears to trust himself among the gift-bearing Greeks of the sheriff's office, and candor compels me to say I do not blame him much. We show that Benjamin Hunter was in Philadelphia from 6 p. m. to 8 p. m., the hour he re-entered his own home; and if there it excludes the conclusion that there can be any truth in the story of the vagabond huckster Graham that he aided or abetted in the murder of John M. Armstrong on that dark and dreary night in January in front of No. 508 Vine street, Camden. We have given you a brief as to the time, showing it was impossible for Graham and Armstrong to go over in the time named by him, from Armstrong's music

store to No. 508 Vine street, and we need not waste words on that point here.

One picture lingers in my memory. It will never leave it. It is too sad. I may be charged with bitterness toward Graham, the man without counsel. I feel it not. May God pity him. I do. The Emancipation Proclamation, which tore away the chains of slavery that had "clasped the Bible with handcuffs and festooned the cross of Christ with chains," breathed life and the sacred soul of liberty into four million chattels till they became men in the eye of the law—like my friend George Warner on the ferry—this proclamation has gone down into history immortal on canvas, by the pencil of Carpenter, the artist. But the subtle devilment of another painting will yet enchain the breathless interest of future artists and orators when a proper picture shall be made of Yoder and Daubman and the gentle Mayor Ayers, with Bill Ewell, the brother-in-law of Graham, a guardian of the poor, but a very poor guardian of Graham, plotting in Jenkins' parlor to catch Graham, whose life he seems to have bartered away to please these Camden inquisitors by the promise of grace, pardon and peace, so that together they could put a rope around the neck of Hunter to please the Provident Life and Trust Insurance Company. Sheriff Daubman can lie as easily as eat his breakfast, anyhow.

Mr. R. S. Jenkins. I am sorry to have to interrupt my friend Colonel Scovel, but he has no right to speak of an officer of this court in that way.

Mr. Scovel. As the sheriff has made himself so much a part of the case, I have a right to animadvert on that official's character.

JUDGE WOODHULL. The bounds of propriety are exceeded by such remarks.

Mr. Scovel. And now, gentlemen, my duty is almost done. I told you in my opening how reverently I invoked the aid of that Great Being before whom judge and lawyers and all the paraphernalia of justice is but the small dust in the balance. I felt then, as I feel now, that the ocean of doubt and danger

was so vast that I trembled and shrunk at the sense of responsibility upon me. That I have discharged my duty conscientiously and with courage, unawed by power, unterrified by hired Hessians from other jurisdictions, will be to me a proud consciousness till I die. And as I take leave of you, gentlemen of the jury, each of you, through the associations of many days as familiar to me as household words, need I say, "acquit yourselves like men." Let your verdict say, "Every man in New Jersey shall have a fair trial under all the sanctions and safeguards of the law." Oh, my friends, see to it that the words of Mr. Jenkins come not to be too fatally true: "And the gold which makes the true man killed and saves the thief may sometimes hang both thief and true man." The thief is not now on trial, but the true man is. Listen not to the clamor of the multitude, if there be such an outcry, saying: "Release unto us Barabbas, the robber," but, on your consciences and your oaths, a safe deliverance make for Benjamin Hunter. Roll away the stone from the sepulchre. The best man who ever wore earth about him was a sufferer; a meek, gentle, tranquil spirit, more patient, even, than Benjamin Hunter has been, whom the prosecution have asked to writhe with grace and groan with melody.

Remember, gentlemen, that great is the religion of power, but greater is the religion of love. Great is the religion of implacable justice, but greater is the religion of pardoning mercy. We don't ask pardon of you; we say that justice and mercy cling together in tenderness and truth when you say, "Not guilty." And oh, gentlemen, when you have opened this man's prison doors, in the sweet bye and bye, with your own children by your own fireside, as they sit upon your knee you will have the sweet consciousness of duty done when you remember the lisping utterances of Benjamin Hunter's little child who said in this court, "When will papa come home?" Gentlemen, open the door of that prisoner's iron cage, that Benjamin Hunter may breathe the free air of Heaven once more, restored to the embrace of that noblest woman of them all, the truest friend this side of heaven—a devoted wife—that woman

whose faith in her husband has never been shaken. And as you open these prison doors, and tell this man to go free, may God's blessing follow you all.¹

MR. ROBESON FOR THE PRISONER.

July 1.

Mr. Robeson. May it please the Court—Gentlemen of the jury: As citizens of the State of New Jersey, whose laws have been broken, you are impaneled to try the question between the State of New Jersey and Benjamin Hunter, a citizen of Philadelphia, a neighboring city, who is arraigned for the murder of John M. Armstrong. In doing this you cannot but realize that you are discharging a most onerous duty as citizens of the State of New Jersey, and this you are to do by the fixed, determined, and settled principles of the law, not by any feelings you may have or passions that may govern you. It is a most trying and disagreeable duty—at the same time the most responsible duty—which belongs to a citizen of a free country. Nor is it a matter of jest or light consideration

¹ During the course of his argument yesterday, Colonel Scovel began to read the case of the Countess of Derby, when the prosecutor interrupted him with the request:

"Please state your authorities, Col. Scovel. What are you citing from?"

"From history," replied Col. Scovel.

Presently Mr. Jenkins, doubtless struck by the familiarity of the story, again interrupted the colonel.

"Isn't that one of Walter Scott's novels you are reading from?" he inquired.

"Yes, it is," was the reply.

"Then why didn't you tell me when I asked you before?" rejoined Mr. Jenkins. "If works of fiction are to be quoted as legal authorities I want to know it."

Colonel Scovel claimed that the case he was citing was really a historical one, although in a work of fiction ("Peveril of the Peak").

JUDGE WOODHULL. Which volume is that you are reading from?

Colonel Scovel. The second, your Honor, page 18.

JUDGE WOODHULL (anxiously). You are not going to read the entire volume, are you? (Laughter.)

Colonel Scovel. No, your Honor. I, as I have before said, have done many wrong things, but never a long thing. (Renewed laughter.)—The Philadelphia *Inquirer*, June 30.

in discharging these duties, and in this we have but one relief—the safeguards thrown around our liberty, without which humanity could not stand the terrible strain. While we tie ourselves to the fixed principles of law and well laid down landmarks, we must do our full and careful duty. What can be said of the man who disregards the principles of the law and substitutes his own opinions for those of the law? Now, then, gentlemen, with these few words preliminary to the discussion, I shall endeavor to deduce the principles on which this trial is to be considered:

First. This prisoner stands charged with murder in an indictment of six counts, of which two lay the killing in New Jersey and four lay the death in Pennsylvania. He is charged as principal in this indictment.

I contend that no man can be connected as principal, no man can be principal, in a murder unless he is present at the murder, aiding, abetting, or counseling. Presence at the murder is necessary to establish the principal. This is recognized in every law book and declared in every court. No lawyer will dispute it that presence is necessary. The assistant prosecutor of the pleas, when he addressed you, said this indictment would be filled if it could be shown the prisoner was present at the murder or caused it to be done. That is not true. Benjamin Hunter might have spent years in planning it and a fortune in its execution, but if he were not present, within aiding or abetting distance, he cannot be convicted. If he is an accessory he cannot be convicted until the principal, the man who has done the killing, is convicted. If a man aids a murderer by keeping watch, no matter how far away he may be, he cannot be convicted. He must be present at the killing, and within aiding distance. A man may do a murder through an inanimate instrument; he may employ an innocent agent, and, with these two exceptions, a man who does a crime through an innocent agent or through others is not guilty. That is a well-established principle of law. A man who employs someone else to do a murder cannot be called a principal. He is merely an accessory before the fact.

Presence is necessary, then, to the connection, and in this case presence in New Jersey must be shown, without which this man cannot be called a principal or be connected as such.

The next point of law is that in procuring the conviction of a prisoner the prosecution must prove every essential point beyond the possibility of a doubt. I shall contend for nothing from you that does not bear the stamp of reason. It is necessary that every essential point necessary for the conviction of the prisoner at the bar must be established beyond a doubt.

Now, is there anything in this case which calls upon you to say that the fact is not absolutely sure? Is there anything in the facts detailed by either side which makes it reasonable for any man to have a reasonable doubt? You should have no doubt as to the entire guilt—no chance of an excuse to say afterward “I thought him guilty.” It is better that ninety-nine guilty men should escape than one innocent man suffer.

The operations of the law should always be above suspicion and without wrong. In ordinary civil cases we may possibly afford to make mistakes, but where human life hangs in the balance he is a bold man, a bad man, who would cut the hair that holds the sword without thoroughly being satisfied he is right.

In establishing my first principle I read from Roscoe’s *Criminal Evidence* the point as to actual presence. In my second proposition I read from Wharton’s *Criminal Law*, that every man is innocent until proved guilty, and if there is a doubt the prisoner should be given the benefit of the doubt. In criminal cases the testimony must be such as to satisfy the jury that the prisoner is guilty beyond a reasonable doubt, and then only can he be convicted.

Wharton on *Homicide* says that “proof beyond reasonable doubt must be had as to all the facts which are necessary to make out the case for the prosecution.” When certain facts are essential, like presence, then a reasonable doubt as to any of these facts should produce the defend-

ant's acquittal. Then, when certain facts are essential, proof of every fact so essential must be had beyond reasonable doubt. I read from Bishop's Criminal Procedure: "The proposition seems so plain that in every criminal case, for whatever particular offense, it is for the prosecuting officer to prove everything that is necessary to be alleged against the defendant." . . .

Now, then, it is also true that as the case is more important, as the questions are more difficult, as the responsibilities are greater, so the law has held that the proof should be stronger. I state that also as a proposition of law. In other words, that a less doubt, a less shaking of their testimony, a less questioning of their proof is required to demand at your hands an acquittal of the prisoner in a case of life and death. But it is said by the assistant prosecutor that when the prisoner sets up an alibi he must prove that alibi beyond a reasonable doubt; that is, when the prisoner denies a thing which is essential for the prosecution to prove, that then the burden of proof shifts.

I say that it is a proposition more monstrous than any that has ever before been heard and maintained in a court of New Jersey. In all my practice, for 30 years at least, I never before, including 10 years as a prosecuting officer, heard that proposition propounded. It is true that when the killing is admitted by the party, and he sets up a separate defense, then that defense must be made out so that it preponderates in favor of the prisoner.

Where a man admits the killing and sets up that he is insane, that is a separate defense. When it is necessary for the State to prove that Benjamin Hunter conspired with another man to kill John M. Armstrong, and that he was there when the murder was committed, how are we to show that he was not there without we show that he was somewhere else.

And are we to be told boldly here, in the presence of the Court, that we must prove it beyond reasonable doubt? There is, I know, some dictum of this kind set up somewhere

in the books, but it is disputed by every lawyer and discarded by every court.

Now, there is another legal proposition that it is proper that we should lay down, and that is that though the evidence of an accomplice is legal and admissible, yet it must be corroborated; that is supported on the other side. Mere corroboration is not enough; it must be corroborative on those points which bring the guilt directly home to the prisoner. The point is, Don't he substitute the wrong man? The meeting, the blow, the death may be corroborated; but that does not bring in the prisoner.

Another point in regard to the corroboration of accomplices is the nature of the corroboration. The authority says it must be proved the accomplice was present, and on such terms of intimacy with the accused as to fill in the surroundings.

The real danger is that the accomplice should relate the transaction truly and attribute a wrong impression as to the participation by the accused. Other authorities require the testimony of the accomplice to be so far corroborated as to show the fact of this prisoner at the bar at Fifth and Vine streets when this deed was done. The established law of the State of New Jersey makes this actually necessary.

It has also been held that a man's wife is not sufficient testimony to corroborate the story of an accomplice. It is also true, gentlemen—but pardon these statements of the law at the outset of my argument; you will find them useful in considering the case—the amount and nature of corroboration required is full and explicit. If an accomplice says, "I struck the blow, am a murderer, but I desire for my extenuation to fix it on this prisoner," under this confession so much the more must you require him to be corroborated and sustained to the fullest extent.

Now, then, gentlemen, I must again ask your pardon if I have taken too much time in laying broadly and firmly the propositions upon which you must stand. I assume that every man of you will be rejoiced if, under the law, you are

able to say to this prisoner, "Go home." I doubt that there is one of you that will not sleep better at night and go more calmly to his home if you can say to this prisoner, "We do not believe you are guilty." What are the admitted facts in this case? They are that on the evening of the 23d day of January, right there (and the speaker referred to the plans prepared by the prosecutor) John M. Armstrong received the blows which afterward resulted in death; right there he was found, with his head lying on this little iron gas stop. That he was stunned there that night admits of no doubt. He was found by Mr. Fidell, who lives in the corner house; he was carried around here to the drug store, about two squares and a half. It is proper that we should endeavor to fix as near as we can the time when that assault took place. It was 10 minutes before 7 when he was carried into the drug store; it took 5 minutes after he was found for Mr. Fidell to get ready to take him around to the drug store. Now, how long had he lain there? He had lain there long enough for the blood to saturate the fur cap and to raise a pool on the pavement about the size of the top of an ordinary basin. Now, let us fix the time the other way. The first boat he could possibly catch was the 6:22 boat. It took 5 minutes to cross and 7 minutes to ride to Second and Vine streets, and it took 4 minutes to walk to Fifth and Vine streets, which would make it again 20 minutes before 7 o'clock.

It is also admitted that about that time an expressman, David Barton, drove up and by, and, noticing the body on the sidewalk, drove up to Mr. Russell's house, and as he jumped out he saw by the cellars two men going eastward. While he was in Mr. Russell's cellar the body was carried away. Graham says when that blow was struck there was no wagon there. He ran by that place when he jumped into these cellars, but he saw no wagon there. The horse was unhitched.

According to his story there was quite a scuffle there. He fled away and, fleeing, threw the hatchet behind him, and

all the while that wagon stood there, from which it is to be presumed that he expected the expressman to emerge from that house every moment. Who were those two men who were seen moving away? If they were innocent, where are they? Could two men be moving away a few minutes before or after the murder and not know it? Who are these men and why have they not been found, and, if not found and innocent, why have they not come forward?

Can it be denied this is so? Does it not appeal to your reason? Now, I pass that proposition for the present. Another thing admitted is the manner of the death of Mr. Armstrong. He died from three contused wounds struck with a blunt instrument like that (showing hammer and pointing out places on his own head where the wounds were); these three wounds were mortal, and any one would produce death. There was a scalp wound produced by falling. It was neither mortal nor dangerous. The others were the mortal wounds. It is admitted they were contused wounds, caused by a blunt instrument, not a sharp one. The doctors found these wounds; so that it is admitted the victim came to his death from them, which might have been made with the hammer or the blunt end of this hatchet. Thomas Graham don't admit that he gave all these wounds; he admits he struck one blow, the hammer falling out of his hand.

When Thomas Graham was on the stand there he would have you think he was not familiar with the streets of Camden; yet when I interrogated him he admitted he knew these streets. How did he learn them? When arrested he was taken to the prosecutor's house, from there to this jail, where he has ever since been locked up, and yet he says he went through certain streets and alleys. How did he learn them? He must have known them upon coming here, as he has had no chance since to learn them.

Now, let us look at the character and surroundings of the prisoner, and his relations with Mr. Armstrong. Mr. Hunter is a man of nearly 60 years of age, who by a life of probity made himself respected in the community where he resided.

As his counsel I am forced to admit his association and connection with Mr. Armstrong were such as to raise a suspicion against him. He had business relations with Mr. Armstrong, being at one time his partner in business, from which he withdrew about a year ago.

He indorsed Mr. Armstrong's notes from time to time, and made loans till Mr. Armstrong was indebted to Mr. Hunter somewhere between \$6,000 or \$7,000. Then Mr. Hunter had Mr. Armstrong's life insured for about \$26,000 in various companies. This was not done without Mr. Armstrong's knowledge, who took part in all the transactions, was examined, and in two of the policies he had his name inserted, making them payable to himself, and in another he had it made payable to Mr. Hunter.

Mr. Armstrong had relations, growing out of his business, with Mr. Ford W. Davis and Mr. Demaris. In the course of this relation notes had passed between them, and a note of Mr. Armstrong had been fraudulently handled, as he alleged, by one of that firm. Mr. Hunter says that he did not know the ins and outs of these transactions, but that he took an interest in the matter he does know.

Mr. Armstrong was a deaf man, and he had talked about this matter more, probably, than he intended, as deaf men are apt to do. Mr. Hunter alleges that in speaking of another transaction he did say: "You go over and I will be there"; but he says that these words referred to matters relating to Mr. Philip Armstrong. Mr. Armstrong, thinking that Mr. Hunter meant to go to Camden with him, wrote to his wife with that understanding.

The prosecution very properly turned to an investigation of Mr. Hunter; the affair was published in the newspapers, and magnified for sensational purposes; Thomas Graham was being pursued by detectives and by officers; he could not fail to feel that they were close upon his track; he was conscious of his guilt and looking about to see what was best for him to do. Large interest was at stake in putting this crime upon Benjamin Hunter.

All the details in the newspapers, the crude conclusions of reporters, were all published in columns, which made it look as though large interests were involved in convicting Benjamin Hunter; \$26,000 were to be saved to the insurance companies by that conviction. Just about that time a letter, the contents of which are not in evidence, appeared in the newspapers, which offered to give to the insurance companies immunity from the payment of the \$26,000 for a large sum of money.

The insurance companies could not be saved the \$26,000 without the conviction of Mr. Hunter. It appears the prosecutor of the pleas repudiated this offer, as far as can be understood. Still the offer was published in the papers. If it was published by Graham or his friends, it showed that they set out to put the crime on Mr. Hunter; if it was not published by them, it was at least published; it is merely inferential that it came by them, for Mr. Graham says no one else had any knowledge of the murder but himself. It was at least scattered broadcast through the streets and alleys of Philadelphia; and no matter what Mr. Graham says, he read it. At that time could he have been kept from reading the newspapers; that man of all others, was he to read and understand how far the investigation had been carried? And when he stands up on this stand with a lie on his lips and says he didn't look at the newspapers, I say he stands before the reason of men a self-convicted liar. Thomas Graham read that letter, if he didn't write it. He was close upon the eve of detection, the officers of justice were following him up.

Even if he got no money, here was a chance where he was likely to get some advantage and some immunity from pursuing this plan. Here, if he could protect large interests, if he could be himself the means of bringing the crime home to Mr. Hunter, why he had the right to expect immunity. It is not the policy of the law to punish to its extent criminals who come forward and give State's evidence. It is not written, it is not a contract signed and sealed, but it is the policy of the law.

Here is an inducement—a criminal, so confessed, a man who admits he did the deed, who, perhaps, in his drunken rioting had let slip some word from his lips putting the pursuers on his track, and here was the chance to escape himself. Is there no motive for himself, for his family, and everyone who takes an interest in him to adopt this course?

Then Thomas Graham, when spoken to by the detective, on his own steps, does nothing—does not ask the man in or tell his family where he intends to go, but simply says I will go; and he comes over here with the officers and his confession follows, putting the crime upon Mr. Hunter. It is not our purpose to put the deed upon Graham. We are to look for the man who had a motive of escape, and the motive of Thomas Graham is so plain that he who runs may read as he runs. Thomas Graham, the former apprentice of Mr. Hunter, the man who was drinking all winter, sleeping in stables and associating with criminals, is put on the stand to criminate Benjamin Hunter; dressed in broadcloth, shaved by barbers, washed clean, thus making him not the Thomas Graham, the dissatisfied young man who tried to fasten a crime upon Benjamin Hunter, a man who for 60 years was respected by all who knew him.

What was his motive? He was the companion of robbers. It is said when men were put upon the stand they were not reputable. How could they be? When we want to prove the character of Benjamin Hunter we put upon the stand men who stand before the community unimpeached. If we want to prove the character of Thomas Graham, would we put Governor Pollock upon the stand? No; we are obliged to call men of his own caliber—the Blackjack Jims and others with whom he associated. He associated exclusively with thieves and garroters, with men who take up their stand where it is not safe for respectable men or women to go. They say robbery was not the motive of the assault, because upon Mr. Armstrong was found \$10 and his watch. Did the man who did the deed have time to rifle his pockets? The close arrival of those who found the body precluded such a thing as robbery.

Mr. Armstrong came here to have a settlement with Mr. Davis; brought his papers with him, of course. Where were those papers when his pockets were searched? They were not found; could not be produced. Now, where were they? Don't misunderstand me. Don't think I accuse Ford W. Davis of doing this deed, for I don't think that Davis would scratch his own initials upon this hammer, then strike the blows and leave it behind him.

A common house hatchet, not the tool of anybody's trade, I know not by whom used, was found with the initials of "F. W. D." on it. It does not appear that Mr. Hunter knew the initials "F. W. D." He had never been associated with him in business. It is not for me to make a motive for Thomas Graham; all that is necessary for me is, since he has admitted that he struck the blow, to prove his irresistible motive to put it on Benjamin Hunter.

This hired garroter, who agreed in the quiet sunlight of a calm winter Sunday in these words: "You know John M. Armstrong; you've got to kill him or you are no friend of mine," and who says, "All right"—would we look for a motive from him? It is said that this life insurance was a motive for Benjamin Hunter—\$26,000 and a debt of only \$7,000. What did he mean by that? It is the settled law of the land, established by decision in the Commonwealth of Pennsylvania, that the law does not recognize wager policies; you can recover the principal and interest of the money you advanced, but the balance you cannot recover. But why make it so large, Mr. Hunter? Why he explained to Mr. Ashbrook, or another insurance man, I don't know which, and he said, "I desire to make it this large because, while I have dissolved partnership, yet under the laws I have been about the office so much that I myself may be brought in as a general partner, and Mr. Hansom, one of the creditors, has already so threatened me."

So far from its being to my mind an inference against Mr. Hunter that he made this large insurance, it seems to me evidence of his perfect unconsciousness of crime.

Thomas Graham tells you that even before this insurance was effected Hunter came to him and proposed that he should kill John M. Armstrong. If he had already made up his mind to kill him, how insane it would have been to pile up an insurance on his life?

That very act alone, judged by reason and by common sense, that very act will show that Benjamin Hunter at that time entertained no foul design toward the life of John M. Armstrong. He went to the insurance companies, told them what he wanted, and sent Armstrong there himself. Would any man in his senses, who at that time had made up his mind to take John Armstrong's life, have done that? And it is said that within a day or two after Armstrong had died he had given one of the policies to a lawyer for collection. He is not arraigned for want of taste.

But if he had a guilty conscience, if within a week he had struck down a friend, if he had that burdening his life and conscience, would he in four days after have taken steps to recover these policies? Is there a man in the world within range of human reason—a man of business experience—that would go to the largest of these insurance policies and say, "Bring us the money at once?"

Two of these policies were on the most expensive plan, being what is known as the endowment plan, costing one-third more. If Hunter proposed to kill Armstrong, why did he take these? He would have simply taken out life policies, terminating with the life of Armstrong, thus saving \$500. If he was going to kill him within 20 years, that money would not have been thrown away. If he intended to kill him within a month he would have saved the difference in the cost of the two classes of policies, and these things all speak in favor of the defendant. Why did he insure him for this amount, and at such a cost, if he proposed to kill him so soon; or, why did he insure for more than \$10,000, which is all the money he could get? Why did he plan this murder so soon, and why did he go so soon after the deed and ask that suit might be brought for the collection of the policies, if he was guilty?

At the recess of the court, gentlemen, I was arguing that the character of the prisoner was such as to make it incumbent on the jury to weigh it well as against the testimony put forward against the prisoner by the State, and I was discussing the testimony which connected the prisoner with the insurance. The letter from the defendant to the deceased advising him not to wear the truss might seem to show the prisoner in the light of a man who desired to deceive the company; but this is not so. He merely wanted Armstrong to leave off an appliance which he wore for safety, as he knew the rupture which Armstrong was suffering from was of so trivial a nature that it could not interfere with the insurance. If the prisoner at the bar had at that time been contemplating the murder of Armstrong he would not have written that letter. Any man in his senses, who premeditated such a crime, would have kept himself out of the case. It has been shown that prisoner was possessed of real estate valued at from \$32,000 to \$42,000. He had over \$28,000 worth of property clear. In addition to what he gained from that source, and what he was able to earn, his wife and daughter had separate incomes. It has been said that the nephew, who was just coming of age, had a claim against him, but it has been shown that \$3,000 of this had been already paid, and nearly the whole of the balance was invested. Was the prisoner pressed for money? You can see how the testimony in the affirmative crumbles the moment it is touched with the spear of truth. The prisoner was a man in good circumstances. See how flimsy and small are the pretenses upon which rest the security of a man's life, and which are conjured up to explain the motive of the crime. A thousand times in his life of labor he had been placed in more difficult straits, with more limited resources from which to meet his obligations, and yet in those 30 years of business life he never did wrong to his friend or neighbor, though a thousand times the pressure was greater than has been shown to you for this crime. He murder for money? He do that thing for \$6,000? Strip himself for that sum of every quality that belonged to him, and for that reason commit a murder more atrocious than the annals of

crime in this country contain? How foolish the thought? Men in his condition sometimes commit crime. No condition of life is a safeguard against it, it is true; but men of this character, of these associations, do not commit crime for money. What strong promptings of ambition, jealousy, anger, urge a man sometimes to commit crime no one can imagine; but let us look at the character of the crime which has been here committed. This was not an encounter in which the animal passions have been aroused. It is not the crime that proceeds from education in crime. It is not the bargain, like that made by Thomas Graham, and carried out without questioning. It is a crime the most degraded that stains the criminal annals of the country. Here was a man who was a friend of the man who was murdered, who furnished him money to carry on his business, who was the friend of his family, who made sacrifices for his sake. This was a murder which was contrived months before it was consummated; the time, the acts, the circumstances, all provided beforehand, all moving with regular steps toward a general consummation, in all its details worthy of a romance in Italian history, foreign to all our national history, ideas, and institutions, and ten thousand times foreign to the blunt and honest Benjamin Hunter, who was reared among the mechanics of a matter-of-fact city. Here is a romance unnatural to our habits of soil and incredible to this man's character and life.

With Thomas Graham it would have been a piece of everyday work. It was the air which he breathed at Spruce street wharf, where the associations were those of stabbing and shooting, where they love riot and strife, where they strike, not for gain but for the love of strife. Sixty, aye, seventy witnesses of the highest character for judgment and consideration came here and said that they had known the prisoner as boy and man, and had never known him to do wrong; that no man in the community in which he lived had a higher character for peace and quietness, gentleness of disposition, and general goodness. This was not the mere formal good word of friends; it was the solid testimony of men who had

observed the prisoner in his daily walk. There was not a man on the stand who would not have freely said of Hunter, "His character is as good as mine." But, says the other side, John S. Morton, who was arraigned the other day for fraud and embezzlement, was a man who could have produced such testimony. The character of Benjamin Hunter was not inherited from a signer of the Declaration of Independence. His character was earned, as he earned his daily bread. He had not been president of a large corporation that was liberal with a large community. Benjamin Hunter earned his reputation day by day and month by month. Morton went step by step in the wrong until he was entangled hopelessly in the circumstances of which he had been the master. The comparison might have been a good one if John S. Morton had been charged with a crime like this. If virtue such as Benjamin Hunter has shown himself to have been possessed of brings out its own reward, what incentive is there for a man to live honestly, uprightly, virtuously? Beside this you have Thomas Graham on the witness stand, acknowledging that he struck down an innocent man in cold blood for a price. Is the testimony of a bravo like that to weigh against the word of a man like Benjamin Hunter? The innocent breath of his children has dispelled this infamous charge of a hired assassin.

It now becomes necessary for me to consider Thomas Graham's story. Graham had been brought up with Benjamin Hunter as his apprentice. Benjamin Hunter liked him well and thought well of him, and was always ready to help him. One day in the early part of last December they met by accident—not by appointment—in Reed street, Philadelphia, between 12 and 2 o'clock. Every Sunday of his life it was the habit of Hunter to eat his dinner with his family between half past 12 and half past 1 o'clock, after coming home from church. Then this singular thing occurred. I asked him over and over again about it and he didn't vary: "Hunter met me and asked me if I knew John M. Armstrong. I said 'Yes.' He said, 'Come up into this little street; I don't want everybody to hear me. Do you know John M. Armstrong?'"

'Yes.' 'Well, he's got to be killed. I want you to do it, and I'll give you \$500 to do it. If you don't do it you're no friend of mine.' " He had his story well learned. If you ask him anything else he would vary, but put him anywhere on that story and he had it like the multiplication table. Two professional burglars or professional stabbers, whose every-day life was one of crime, might do that thing, but not two such men as Benjamin Hunter and Thomas Graham, master and apprentice. Take the story as it stands and as the State makes its proof. If I misstate the testimony I shall find no fault if I am corrected on the spot by the representatives of the State. Graham says to this horrible proposition, "All right." There was no engagement or appointment to meet again. They met again in three weeks at Stiles'.

At the time this alleged plan was drawn the understanding was that Graham was to kill Armstrong in Philadelphia. The Davis complication had not yet arisen, and there was no reason why Armstrong should come over to Camden. I want the jury to think of this. Graham, in his well-considered story, evidently did not think of it. Hunter had never before suggested Camden as a place of murder. Why should Hunter prepare that plan when there was nothing to take Armstrong to Davis' house? According to Graham's own story he and Hunter were at no one time five minutes together to arrange this thing. I am now dealing with you as with honest, reasoning men, who are fit to be intrusted with the most serious responsibility that can be given to men. Think of it. Where were these men to meet, where were they to go, where were they to escape to, and how? According to Tom Graham there were none of these details arranged. But, he says Hunter wrote him a good many notes about this thing. Where's one of them? Show us the scratch of a pen or the mark of a pencil. One of those notes would build up the case against Hunter so that it would be almost impossible to overthrow it; but where is even that one? It is by these little things that you are to be enabled to judge of the truth or falsity of a charge like this. Why, if Hunter did not know the number

of Davis' house, as has been sworn to in this case, should he draw a plan of that neighborhood? He has been shown not to have known until the 20th of January where Davis lived, but it was five weeks before that that he is said to have drawn the plan. The weapon, too, had been marked "F. W. D." a month beforehand and given to Tom Graham. Of course, it was meant at that time that the murder was to have been done in Philadelphia. Then why put "F. W. D." on the hammer at that time? I do not believe, gentlemen, that those letters were on that weapon at that time. That tool was one of those which Tom Graham was using on the very day he was discharged from Stiles'? Graham is contradicted in this matter by his own wife. Graham said that he took the hammer home on that night and put it in the bottom of the closet. She says he handed the bundle to her and she put it away. She says that she did not know what was in the bundle. But how many newspapers would have to be wrapped around such an implement to disguise its shape?

Whoever heard of a man hiring an assassin to do a murder and then committing the crime himself? Going to the most public places, and yet having murder in his heart all the time; making an arrangement with John M. Armstrong to lead him to his death, and taking him by the arm in the presence of a man who had known him for years; wearing all the time a slouched hat and a cape which would rather serve to attract attention than to disguise him. The prisoner seems to have been so closely disguised that it is only those who never saw him before that night who saw him then and can come in five months afterward and identify him. Can this story stand by itself? No! it is a naked, ragged skeleton, built up of suspicions and excitements that will crumble when left to sustain itself. We are expected to believe that Hunter came over in the most public manner with his victim from Philadelphia, got on a public car and got off it again with a half dozen other people, and leads him to the dark spot where the deed is to be done. Graham would not have been likely to have thrown himself headlong into the celler he spoke of with a

wide, open common in front of him, and it was alike absurd to suppose that the remaining portions of Graham's story were true.

Mr. Robeson reminded the jury of the absence of those details which would show an arrangement between Hunter and Graham in connection with the murder of Armstrong. He pointed to the fact that no arrangement had been shown except that Hunter said "Armstrong has got to be killed, and you have got to kill him," and that he handed a hammer to Graham after having given him a hatchet. This was self-evidently absurd, as was, also, the story that Hunter was overheard to make an engagement with Armstrong on that morning to come over to Camden, and yet no place of meeting was agreed upon. It was not to be denied that Thomas Graham dogged Armstrong from Eighth and Sansom streets to Camden, and struck him down in the latter place; but Hunter was not there, else why do not the employes, who knew him well, testify to the fact? Harvey Edgar says that he was the last man to leave Armstrong's place that evening, and he did not see Hunter there.

Mr. Robeson then traced Graham's statement about Hunter and Armstrong walking down Sansom street together into the brilliantly lighted post office, where Armstrong and Hunter might reasonably expect to meet persons whom they knew, and asked where was the man whom they ran into, according to Graham's statement.

We come now to the disparity of time concerning the trip to Camden. Harry Edgar says that Armstrong left the office shortly before 6, and when they parted it was 12 past 6. How long would this give them to walk down through the streets, stopping at the post office, and reach the boat? Armstrong did do it. He must have reached the 22-minutes-past 6 boat, for he was carried dying into Justice's drug store at 10 minutes to 7. Thirty-five minutes after leaving Seventh and Sansom streets he was carried into the drug store. It can't be doubted that he did it, but did he do it that way? Why, it took General Corse 15 minutes to go from Seventh and

Sansom to the boat, and he walked briskly, without stopping without running into anybody. How could Armstrong have done it under the circumstances? But he did make the boat; he must have made it; he might have taken the cars—but it stands that he did make the boat. If he came over in the boat he must have taken the cars. Graham lies, and, while Mrs. Auvache probably does not lie, she is certainly mistaken.

Graham says that when they came over to Camden they got into the cars; that Graham kept up with the cars, running behind; 22 minutes past 6 on the boat, no passengers but himself, he says, and the two men. Graham ran up the streets of Camden with the hatchet in one pocket and the hammer in the other. Who is there in Camden that saw him? Where is the man that saw this man racing up the streets of Camden following that car? If there were people who saw Armstrong riding in the car, an every-day occurrence, where is the man who saw Graham? Has he been sitting here in court? Why, I wonder that he has not come forward. It is not a thing to be down on a man for saying. It isn't a thing to say a man lies when he says, under his oath, that he sees this kind of thing. I am not declaiming against individuals; I am speaking to you of the temper of the human mind; it is a weak vessel.

My friend, the prosecutor, knows how this is; how difficult it is to sift truth from falsehood. Graham says when they got up on Vine street Mr. Hunter turned up this alley (referring to the plans), and as he came out he said "Yes!" and that he (Graham), when he got there, between the window and the gate, he advanced upon Armstrong with a weapon in each hand; that Armstrong stood facing him; that he went up and struck him a blow on the right side of the head; that the thimble flew off; that the hammer slipped out of his hand; that he was frightened and fled; that he threw the hatchet behind him, and that he jumped into the cellar and ran away. In his clear confession he says Armstrong stood facing the alley; that he struck him with a hammer; he didn't cry out, "I dropped the hammer and hatchet, and he ran away." He

didn't hear him cry out. Now, let's see if that is true. John Armstrong was killed by the contused wounds which could have been inflicted with the hammer or the hatchet. Graham says that the hammer flew out of his hands and he ran away. But do you believe that story? Is it a likely one? He had heard the cry of the victim, "God spare my life!" Did he leave him then, half finished, with help within three feet? Armstrong knew Graham, he knew his face, and is it to be thought he left him thus to be recognized in the future should the victim live? In the few seconds which, according to Graham's story, it took him to turn, throw the hatchet away, Hunter had to search for it and finish the work. Why in these few seconds, with the victim still alive, with help so close, did he not cry? Why did he not fight or struggle with the agony of a man stricken down? Where was the expressman that he could not hear the cry that must have come from the man's lips, that must have drawn to his side Fidell or the expressman? Then Hunter goes quietly home, without washing his hands, talks to his wife and children, calls for the paper to read the events of the day, quiet and unruffled. Is this the act of a man who had committed such a crime? I believe the murderer of John M. Armstrong stood in the alley! I believe that Graham stood in the alley shown in the plan; that Armstrong faced the alley and Graham came out and struck him one, two, three blows; and this, I believe, he told in his clear confession. He came out of that alley; he struck the blows, and as he did so this cap came off and fell, but before it did so the hatchet had already fallen, and when Mr. Fidell found the hatchet it was under the cap. The blow was not given with the hatchet, for the blow was given after the cap was off which covered the hatchet. It was not the hatchet Graham threw away; it was the hammer with which he struck the blow. Who gave those three blows? Thomas Graham! Liar once, liar always. False in one particular, false in every particular. And this fact of the hatchet being found under the cap proves he lies as to how he threw the hatchet away, according to his own story.

Although Graham had his story pat enough himself, it was not corroborated in its essential parts. The meeting of Hunter with Graham was the result of the former's kind disposition to get the latter work, and many of the witnesses for the State had given free play to their imaginations. For instance, the sensation about the bandages, for the doctor, when questioned under oath on the subject, said he had found the bandages just as he had left them.

Carey said he understood that morning that Hunter and Armstrong made arrangements to come over together; that he heard Hunter say, "That man has a bank account in Camden; go over and I will go with you." Hunter was there and had a conversation with Armstrong, but neither Carey nor Hunter is able to repeat all that conversation. Hunter explains that language which Carey recites. He did say "Go over, and I will be there"; but he says he did not mean Camden, but he meant the sale of Philip Armstrong's property at Thomas' auction store. If he intended going to Camden with Armstrong, there would have been some arrangements as to a place of meeting; but Armstrong did not even wait for him. It was a cold, threatening night, and he started off without his companion. If he had expected Hunter was going with him, he would have waited for him in the office. Even that very day he had been to see his lawyer in the morning, and told him of the Davis matter and his intention of going to Camden that night; but nowhere in the evidence is it shown that he told his lawyer or anybody else that Mr. Hunter was going with him.

As Mr. Hunter says, Mr. Armstrong was like all deaf men; he said "no" sometimes when he meant "yes," and said "yes" when he meant "no"; and it is probable that he thought Mr. Hunter was going with him, and so wrote to his wife. And again, it is well understood that Mrs. Armstrong was afraid to see her husband go to Camden, and therefore it might have been that Mr. Armstrong wrote and said, "Mr. Hunter is going with me," feeling that she would be easier in her mind.

It is said by Graham that on the morning of the murder,

at about noon, Mr. Hunter and he went to Spellissy's hat store and bought a soft hat to wear while coming over to kill John Armstrong. The story is, that prior to going to Virginia Mr. Hunter went with Graham to this hat store to buy a cloth hat to wear in the cars; he did there buy a hat for a dollar, gave Mrs. Spellissy a \$5 bill, and that while she was out he had a talk with the girl; he put the hat in his overcoat pocket and took it home; when he reached home he put the hat in another coat, wrapped it up in a bundle, and carried it away; when he reached Washington, and after he had gotten away from the train, he found that he had left it in the cars. Graham was looking for certain facts to corroborate his story, and, remembering the visit to the hat store, he said why he went on that morning to Spellissy's hat store. The officers of the law go over to the store and ask the women if they remember of two men coming there to buy a hat, and they say they do, and their imagination is fixed upon this particular day by the officers, and by the narratives with which the newspapers teemed for months after the murder. Mrs. Spellissy only remembers that it was bought at dusk, and not at midday. She contradicts Graham there and corroborates Mr. Hunter's story. Alice Coleman, younger, more impressionable, more excitable, remembers more. The incidents of this tragedy have made a deep impression upon her mind, but she can't tell the day of the week. She thinks it was on a Wednesday, and he came there the next day, got his hat, and left the soft one there. But where was it? If he wore the hat on the night of that terrible tragedy, did he take it back and deposit it in the show case? If so, where is it? It was on a Wednesday, she thinks, but not on the day of the murder. He was there, she says, "three times, and he asked me how business was." Was that the 10th day of December or the 23d day of January? It is all the result of imagination. The one visit has grown into three, and one conversation has been magnified into long disquisitions. Is it likely he would go into a neighborhood where he was so well known, buy a hat to use as a disguise, talk to a woman, and make sure of recognition? Why the story is ridiculous.

If it was said he had told the whole story of the crime, told the people in the store that he hired a man to do the work, "Give me a hat that I may disguise myself," and, after it was done, come back and say, "Here, take the hat, I have done the deed; I have no more use for it"—all this would be as likely of belief, and shows how much faith can be put in this story. All the circumstances in this affair point to an innocent transaction. The visit to the store, the explanation as to what the hat was wanted for, the conversations that occurred there are of such a nature as to disprove what the State would make you believe of them. The story told by my client on the stand was no flippant tale, was no studied story that when he started on he ran ahead of you, but the statement of a man telling the truth, and in such a manner as to convince you he felt that life and death hung in the balance.

Mr. Robeson adverted to the fact of the law preventing *Mrs. Hunter* from testifying, and at some length went over the testimony given by *Hunter's* daughter and son in reference to the return of the father on the night of the murder with a high hat on, and not a soft one. If that be true, *Thomas Graham's* story that he went up there with a soft hat and changed it next morning fades like the mists of morning before the rising sun.

I shall now explain the postal card which was put in evidence as one sent to *Ford W. Davis* under date of January 21 and reading, "I will be over to see you about 7 o'clock; be sure and be in. J. M. A." *Mr. Graham* says that *Hunter* gave him that card on Tuesday morning at a time he met him at *Hughes' store*. It looks to me like another instance of *Graham* tying himself to this point in order to establish his story. Why should *Mr. Hunter* have this card? How did he get it? Why should it be given to *Mr. Hunter* to take to Sixteenth and Cherry to be put in a post-office box? What was there of necessity, convenience, or point to give it to *Thomas Graham*? But *Thomas Graham* says he gave it to him to put in the box, and then it is produced to prove his story. I think from its improbability it rather disproves his

story. The appointment is for Tuesday night, not the Wednesday night of the murder. I merely mention this as a wild and extraordinary incident seized upon by Thomas Graham to tie himself fast to the facts in this case.

As to the testimony of Mrs. Auvache, think of the brilliancy of memory of a witness who could come into court five months after the 23d of January and positively identify Hunter as a man at whom she had taken a passing glance on the evening of that day. And her entry in the diary of her trip to Philadelphia on that day, only two other entries being made in the whole book. She insisted that the ladies' cabin on the boat she came over on was on the left-hand side of the boat, although the ladies' cabin is on the right side of the boat.

Mr. Jenkins. Is there any proof in this case as to what side the ladies' cabin is located?

Mr. Robeson. Does the prosecutor dispute that fact?

Mr. Jenkins. I dispute that it is in testimony.

Mr. Robeson. I don't care whether it is or not. I think Moore testified to the fact, but it does not matter; the Court knows, the jury knows, the people know, and the prosecutor knows that the ladies' cabin on the boats of the Camden ferry is on the right-hand side. I gave Mrs. Auvache every opportunity to rectify her statement by asking her every form of question about it, but she stuck to her falsehood. I am inclined to the belief that Mrs. Auvache came into the case under an ambition to appear as a principal witness. There were a good many other witnesses who came in under the same incentive.

Moore came on the stand five months after he saw Hunter with a slouch hat and overcoat on and recognizes him without hat or overcoat. Mayor Ayers goes on the boat on a summer evening to try the experiment of recognizing people on it, and the best he can do, standing in the position Moore says he occupied when he saw Hunter at the chain, is to say he could tell a white man from a colored man. Before I would have done what Moore did, I would have let my right arm be palsied. He identify Hunter under the circumstances he

claims? God save the mark! Moore recognized Hunter when he came here to the preliminary hearing, but although he was with officers of the court, he said never a word. He says he didn't want to bring the name of a girl he was going to see on Ridge avenue into the case. That was a far-fetched explanation. He says he mentioned it to David Pearson, but when we come to hunt up Pearson he is not to be found.

Mr. Jenkins. One minute, Mr. Robeson. Mr. Pearson has been in this court room on nearly every day of this trial.

Mr. Robeson. We couldn't find him.

Mr. Jenkins. You should have proved it.

Mr. Robeson. We couldn't prove it. Now, Mr. Jenkins, you are following this man with an energy that may result in his death. I find no fault with that; you are doing your duty as the law officer of the State; but I have my rights and duties and privileges here while I am arguing in his defense, and I will demand them to the utmost. I do not want to be interrupted at every step.

Mr. Jenkins. Indeed, Mr. Robeson, it is with sincere sorrow that I thus interrupt you, but you are occupying so much time that I will have no opportunity.

Mr. Robeson. Don't talk to me of time under such circumstances as these. It is my duty to defend this man to the utmost extent of my ability, without regard to the time it takes.

Great excitement was created by the newspapers in this case. Some of them had Hunter tried, convicted, and hanged before the jury was impaneled. An incident that happened under my own observation in a quiet New England town some 10 years ago, when a quiet, happy, and worthy little community was worried crazy by the ravings of a lunatic who was predicting that the world was about coming to an end, illustrates how people get carried away by excitement.

Mortland says Hunter and Armstrong got into his car on the evening of the 23d of January. But Mortland, the driver, couldn't recollect anything of that kind on the day after the assault was made, or, if he did, he didn't tell Officer Johntry

when the latter asked him. The testimony showed that Mortland's car left the ferry at a quarter past 6 on that evening, and again at quarter of 7. They couldn't have ridden with him on the first trip, for they were then in Philadelphia, and at the time the car next left the ferry poor Armstrong was lying in Vine street stricken down by the blow of a ruffian. Mortland was honest enough and did not want to swear falsely, but, like others of the witnesses, his mind was inflamed by the influences that were at work in this case, and his imagination was enlivened.

The prisoner's evidence was a story told by a blunt, honest man; not carefully studied as Tom Graham's was, so glib that if he were started at one end he would run to the other if not interrupted, but made up of the careful, thoughtful answers of a man of few words. I would prefer the thumbscrew and the rack and the boot to the torture to which Benjamin Hunter was subjected; and when in the majesty of his wrath he stands up and with the indignation of justice says "You are a liar" to a man who came to swear away his life, humanity broke forth from the restraint with a force that knew no rules. Why was not Sprole put on the stand to rebut Hunter's allegation that he didn't know the man. It had been characterized as a very violent exhibition, but the worm will turn when trodden upon. The mildest-mannered man in the world would turn when thus trodden upon. But what did he say on the night he was arrested, we are asked. Didn't he contradict himself? Well, I have read his evidence and can't see that there was any contradiction that may not be fairly explained. If that story be true, he was not in Camden at the time of the murder and must be acquitted.

If it were proved by a thousand witnesses that he had a hand in the murder he could not be convicted. He brings Mr. Young, a conductor for five years on the Tenth Street Railway Company, to prove that he rode on that witness' car on that evening, leaving Tenth and Columbia avenue, or thereabouts, at 7:28 p. m., and Tenth and Oxford streets, where he got on, at 7:30. He remembered the incident about an intoxi-

cated woman in the car, which Hunter also remembered. He saw Hunter get out of the car at his own door, and go into his own house. This unimpeached and unimpeachable witness knew Hunter, both by sight and name. His was not a passing glance of a man in the darkness of an unlighted boat, but the long conversation with a man whom he knew. Either Washington L. Young lies or Benjamin Hunter was not at the scene of the murder at 20 minutes of 7 on that night. Dare you, gentlemen of the jury, holding as you do the scales of life and death, say that that unimpeached witness did not tell the truth?

The corroborative testimony of Mr. Royer, who saw Hunter in a Tenth street car on that evening, and the testimony of Mrs. Lott, who states that she got out of the car that Mr. Hunter was in that night, is testimony which the jury must regard. The prisoner asked consideration, not as a favor but as a right; he cried out, not for mercy but for the law and right.

Thomas Graham confesses that he struck the murderous blow. What incited it? It behooved not the defense to say, but it did behoove the prosecution to open its eyes to the fact that Benjamin Hunter could not have done it. Who was Thomas Graham? A common stabber by his own showing. He says he received the hammer from Benjamin Hunter wrapped up in paper, and that, without examining it, he put it away in the closet. He never studied the appearance of the hammer, and yet he recognized it the moment he saw it in the grand-jury room. Where is Graham's kit of tools? Was there no one else who had an enmity against Armstrong? Who were those two men that walked away? I know not. Where are those two men now? If they were innocent men, why do they keep in concealment? If Thomas Graham was one of them, why does he not tell who the other one was? Who and where are they? If Graham was one of the men, is the other kept away because there are not \$26,000 saved to the insurance companies by his being brought forward? Graham says there was no wagon there when he struck the blow.

We are told that we have a set-up alibi in this case, and that we must prove it or be hanged. This is a monstrous proposition. The prisoner must be at the murder, aiding, assisting, and abetting, or he cannot be found guilty of this charge. He must have been somewhere, and it was in proving where he was that we brought the witnesses you have listened to. The prosecution resorted to a desperate expedient to prove that Hunter might have been here at the murder and also get to Tenth and Oxford streets at the time we have shown him to be there on the evening of January 23. They took the sheriff and one or two others and drove through the streets of Philadelphia at the rate of 11 miles an hour to show that Hunter could have done the same thing. That attempt shows the force of the alibi in this case. All things are possible, and he might have done that; but we do not hang people on suppositions. All things must be clearly and unmistakably proved against the prisoner.

Gentlemen, I have done—I have, in my poor way, done all that I could do, and it now devolves on you to do yours. Benjamin Hunter, the sedate business man, the father of an interesting family, is attacked by a common stabber, by a man who says he was willing, almost without consultation, to strike down John M. Armstrong, and who, you can easily believe, will take the stand and swear away the life of his best friend. Can such things be and meet the sanction of the law and the verdict of an honest jury? An honest jury stands up against public opinion when necessary, and gives a deliverance to the prisoner on the testimony as it appears to their consciences and judgment. An honest jury says, “We will stand like the rocks in the surging sea against the waves of popular opinion.” Benjamin Hunter has a family whose hopes for the present and the future are in your hands. Benjamin Hunter, whatever may come to you, you will have the consolation of knowing that your friends, the best in this or any other community, gathered around you in your moment of trial. Gentlemen, be true to yourselves and to the prisoner. God bless you all and guide you in your deliberations.

MR. RICHARD S. JENKINS FOR THE STATE.

July 3.

Mr. R. S. Jenkins. With the permission of the Court—don't be frightened, gentlemen of the jury—with the thermometer at 90 degrees, my case is not so desperate as to require one day, let alone two, for its presentation. It will be your own fault if you do not spend the birthday of our national independence with your families and with your friends. And do not ascribe to me any disrespect when I say to you that I have thought it to be my duty in the progress of this case—one of such great gravity and moment—to watch the demeanor, scan the morale, and weigh the capacity of each and every one of you to whom this arbitrament is to be committed.

From the very outstart we are told, as the proof has developed, that this defendant was a rich man, who drove his own carriage, and somehow or another this halo of riches has so surrounded this case that the air has become impregnated with it, and rumors have got afloat too startling to believe, too monstrous to repeat, but which amount substantially to this: That because you are not all clothed in purple and diamonds and fine linen some of you are approachable, unreliable, and will prove recreant to your trust. I here publicly repudiate, denounce, and deny these slanders. I profess, after an experience as prosecutor for 14 years, to know something of juries, and I am glad to say, and proud for the county of Camden, under the circumstances, to be able to say that I never presented a case to a more respectable, attentive, and well-behaved jury, and I have no doubt, in spite of your not being rich men, in spite of not driving your own carriage, but that you will honestly, fairly, and faithfully true deliverance make between the State of New Jersey and the prisoner at the bar. And bear with me here, gentlemen, while I just digress from the straight line of my argument and step, perhaps, outside of the case.

After the baneful example of Colonel Scovel, it is to do a simple act of justice. The great atrocity, the reckless boldness, the shrewd contrivance, and resultant cruelty of the

Armstrong murder were early apparent, and society called in the loudest tones for the speedy detection and conviction of the murderer. Whether right or wrong, the statutes of New Jersey imposed the main burden of responsibility upon my shoulders.

“It shall be the duty of the prosecutor of the pleas for each county (I am citing from Criminal Procedure, section 100) to use all dutiful and lawful diligence for the detection, arrest, indictment, and conviction of offenders against the laws.”

And in the absence of a police force adequate in point of numbers even for home duty, I applied for assistance to the head of the constabulary of the county of Camden—that is to say, Mr. Daubman, the sheriff—and he and I, in the absence of any detectives within our control, solicited the authorities of Philadelphia to detail us an officer of probity, skill, and discretion, which was kindly done in the person of Detective Yoder. Now, to be sure, my idea of doing things is diametrically opposite, thank God, to Colonel Scovel’s, but I did think, and still think, that I did the best thing possible. I had enlisted the services of the sheriff, chief of police, as it were, of the county, a man honored with the confidence of a large constituency, faithful, without reproach, who would have been false to his trust and recreant to his obligations, in spite of the balderdash and say-so of Colonel Scovel, if he had not responded to my appeal with alacrity and effect; and he and I associated with us Samuel Yoder, an officer of 20 years’ experience in the police service of the city of Philadelphia, and whose reputation in all respects has for all time been unimpeached and unimpeachable.

Preliminary to the presentation and consideration of the testimony of Graham and its corroboration, upon which, you will recollect, the State rests this case, there are certain outside features to which I desire to direct your attention. And first, the man who murdered John M. Armstrong, or caused him to be murdered, was familiar, in most respects, with the Davis-Armstrong complication. In fact, from such familiarity the plot of this dreadful tragedy was deduced. He knew

of the existence of that unpleasantness, to use a mild term, which usually subsists between the pushing creditor and the non-responsive debtor. He knew the nature of that unpleasantness, and, then, he knew the parties, their places of domicile, their means of livelihood, their usage, habits, temperament. And, knowing all this, he turned it to the very best possible account in the execution of his foul purpose.

Did Benjamin Hunter have this knowledge so as to use it? He was the social friend, the business friend of Armstrong. In fact, he was the main money repository to whom Armstrong resorted in times of need. Is it credible that the Davis-Demaris matter, which had so embarrassed Armstrong, was not detailed to him? Can you imagine for a moment that this fertile reason for soliciting loans was not seized upon and used, and does not the proof demonstrate that Hunter knew all about it? I know that he denies it, but I also know that from time primeval a lie has been the cloak to which sin always has recourse, and how thin that cloak is in this instance is evidenced by Hunter's admissions under the strain of cross-examination. And the conversation between Hunter and Armstrong overheard by Carey, the visit with Armstrong to Demaris, all admit of but one conclusion that Benjamin Hunter had a thorough knowledge of this Davis-Armstrong complication. And that he could make use, and did make use, of that knowledge in carrying out his wicked design is equally demonstrated.

You will recollect that no one in all the world save Hunter "saw murder depicted in Davis' countenance," as he told Mrs. Armstrong. It was his searching vision that detected that Davis "was a bad-looking man and a man capable of doing anything."

You will recollect that he told Charles T. Lorilliere that he had told Armstrong to take care and keep away from that man (meaning Davis); that he would do him some harm.

You will recollect that when he gave Graham, at Stiles', the plan of the house over there and told him to keep it and

not to let any one see it, he said that Davis owed Armstrong some money, and Armstrong had been over there. Hence the killing of Armstrong at Camden, near Davis' house, hence the cutting of the initials "F. W. D.," which stand for Ford W. Davis, on the weapons, and hence the leaving of the weapons thus marked at the scene of the crime. It was a bold design, carried out to the letter, and it was intended to protect the rich man, who drove his own carriage, at the expense of the poor man with his six little babes—but it overreached itself.

Again, the man who murdered John M. Armstrong, or caused him to be murdered, must have known of Armstrong's preconceived movements for that Wednesday night. Did Benjamin Hunter have this knowledge? He not only knew of these arrangements, he suggested and induced them. I know that he denies this also, but what says the proof?

Stephen H. Carey, a witness so little favorable to the State, to say the least, that he had to be brought here and kept here by force, details this conversation that he overheard between Hunter and Armstrong on the very Wednesday morning of the murder. Hunter said, "This man has a bank account; I heard it from private and outside parties. You go there tonight at 7 o'clock; I will go with you." There is no one in this court house but believes that Carey told the truth; that the man with the bank account referred to was Davis, and the place arranged to go to at 7 o'clock in the evening was Camden. Frank L. Armstrong, a perfectly creditable witness, testifies that his father told him that Wednesday that Mr. Hunter had told him that some one had told him that Davis had a bank account; that he had advised father to come over and see about it and get the money and he would go with him. "Father said he intended to go with Mr. Hunter, and he and Mr. Hunter were going to Camden that night."

William L. Donnell, another perfectly reliable witness, and whose testimony was altogether ignored by both my opponents, testifies that on the Wednesday of the murder, about half past 2 o'clock in the afternoon, Mr. Armstrong told him that he was going to see Mr. Davis; that he had been over the night

before and was going back that night; that he had seen Davis, and he was in very poor circumstances, but a certain party had told him he had money in bank, and they were going over tonight to see about it.

And, finally, we have the dead man himself rising to judgment against his assassins, in the shape of this last letter of a fond and considerate husband and a truthful and unsuspecting friend.

The upshot of all this, then, is that on the evening of the 23d of January last, when John M. Armstrong was mortally assailed, Benjamin F. Hunter had, in fact, \$26,000 dependent upon the termination of Armstrong's life. And not only this. Benjamin F. Hunter, while always professing, with the ordinary ostentation of dishonesty, to be a rich man who could drive his own carriage, was really, on the 23d of January, as I will show you, embarrassed and out of funds, while, according to his own exhibit, he then had a landed estate of some \$33,000 in market value, yet admissibly this was all he had, and the income derivable from that was only some \$2,100, from which taxes and mortgage interest had to be deducted, so that in fact Hunter's net income—and it is his net income of which I speak—at this date was not much over \$500, as demonstrated in the testimony. But he claims his boy's wages, \$175 a year, and his daughter's salary, \$500, as a teacher in the public school, when she took that position, as she tells you, in order to be independent, and his wife's interest of \$500 a year; and while this claim itself is strong evidence of the soundness of my position, give it to him and what is the result? Simply that his income was \$1,675 at the most, upon which to keep a horse and carriage, to feed and clothe a family of six, and to provide for such repairs to his real estate as exigencies might call for.

But let us go a step further. From this sum of \$1,675 there must be deducted the insurance premiums that the defendant had undertaken to pay, viz, \$376.80 to the Provident, \$203.28 to the Manhattan, and \$554.40 to the New York Mutual, making a total of \$1,134.48, which, if deducted from \$1,675, will

leave \$540.52 as the net income of the defendant and his family—\$540.52 to keep a horse and carriage and feed and clothe a family of six in the city of Philadelphia. Gracious heavens! where was the bread even to come from? But go still a step further. It is in testimony that this defendant was responsible at this date upon a bond of either \$1,000 or \$1,100 which had to be paid either in January or February of that year; that he had funds of a ward, one Frederick Getz, to the amount of \$5,270, which had to be accounted for and paid, and, remember, the March quarterly premiums on the Armstrong policies had to be provided for.

Is not all this a state of facts which fastens at least a motive for this murder upon this defendant so unassailable that the three score and ten gentlemen, who, unlike the recreant Epp, were willing—and, permit me to say, properly willing—to leave their homes and business and come over to our jurisdiction to testify to a gentleness of disposition on the part of this defendant, which I will show you hereafter he never had, cannot even cavil at or dispute. Again, the man who murdered John M. Armstrong, or caused him to be murdered, under the providence of God and in the natural course of things would be likely to betray his guilt by word or action. How will Benjamin F. Hunter stand this ordeal? Let us see.

And first look at his conduct in the negotiation of the insurance policies. It was a monstrous thing for a man of his means to undertake to carry such a load, involving the payment of \$1,130 a year in premiums. And this to secure the comparatively paltry sum of \$6,671! Why, had Armstrong lived the ordinary allotted term of life—and you will recollect that Dr. Chapman says he was a perfectly healthy man—and had Hunter paid these premiums, as he undertook to do, such payments and interest would have more than swallowed up the whole principal of \$26,000. Could anything but a settled object, a fixed purpose, a prearranged and preconceived design to profit by it, explain such questionable action of a sane man?

And then, besides, a single failure at any time in any of these payments would have involved a forfeiture of the whole

policy. And then the *modus operandi* of the insurance negotiations, the active initiative part taken by the defendant, the questions asked, the application made for the three several policies at about the same time, the advice to hide the fact of the rupture, and the hiding of it, as the policies show; the ignorance of the insured as to the amounts of the insurances; all of which things are proved and are facts in this case. These matters are at least suspicious when unsatisfactorily explained. But when a man of ordinary intelligence, who has passed the meridian of life, absolutely lies in his explanation of such matters, as the testimony of Joseph Nichols demonstrates this defendant did, and when such grown-up man, virtually admitting his shortcoming, can only plead in extenuation such a miserable, contemptible excuse as that he should not be held responsible for anything he said that night because he had been jerked here from his own home, under such circumstances, I say these matters cease to be only suspicions and assume the shape of proved facts.

Why, poor Tom Graham, not a voluntary comer to this State by any means, as this defendant was, told his clear statement, as he calls it, months ago between midnight and morning, and has not varied from it a feather's weight from that time to this, as I will show you when the proper time arrives. And then the concealment of this defendant in his conversation with Sherman, subsequent to Armstrong's death, that he had any but a \$6,000 lien upon his life; his hasty application to counsel barely three days after Armstrong's death, so unsatisfactorily explained, for the speedy collection of \$10,000, the New York Mutual policy, the only policy, by-the-by, in which the rupture is acknowledged. How can these things be accounted for, under all these circumstances, consistently with guiltlessness and reason?

But, independent of the negotiation of these policies of insurance, let us look elsewhere at this defendant's conduct for betrayal of his guilt. What is his explanation of his sudden freaks of interest during the months of December and January last in Thomas Graham? Why did he go to Mrs.

Ulrich's to find his whereabouts—why hold those interviews at Hughes' office, and follow him to Stiles' shop; why seek him at Mrs. Ulrich's, even on the Lord's day, and absolutely besiege his castle, as it were, for several hours on the Monday previous to the murder? The proof has developed that for years previous there had been little or no intercourse between Thomas Graham and Benjamin F. Hunter. Whence comes this interest, then? Of course, I very well remember that much of the testimony relating to these points is disputed and denied by Hunter, but I also remember that Hunter is a defendant on trial for his life, and he alone denies it.

And who can doubt but that Mrs. Ulrich, whom Colonel Scovel honored as the most respectable woman who had appeared on our side of the case—I wonder if her beauty had anything to do with this? And poor, broken-down Mrs. Graham, and Mrs. Ewell, against whom he has not so much as wagged his tongue—they and each of them told the truth, the whole truth, and nothing but the truth; and yet they gave you the time, the place, the details of Hunter's visits so precisely, so positively that you can have no reasonable doubt about them.

I say again, then, whence comes the interest of this defendant in Thomas Graham? Why, admissibly at least, did he meet him at Hughes' and Stiles', treat him at Gibbons', and open his purse strings on last New Year's eve—with such a slender means as I have shown you he possessed—to the extent of \$5. I cannot conceive that this defendant's explanation, "I was trying to get work for Graham," can be satisfactory to you as reasonable men.

Here is the clear confession of a man who, with a sweet wife and a little child, comes forward and declares himself a murderer. And you must not be carried away by the eloquence of the counsel on the other side and believe that Thomas Graham has been given the chance of saving his life. The State of New Jersey will never permit a hired assassin to escape the punishment of his crime; and as

sorry as I would be to see Thomas Graham executed, yet I say as sure as he came forward and told his story he must hang. Do you believe, Mr. Foreman, that he would come here with a lie on his lips and admit to you that he struck the first blow? No; he would have lied in his own defense. Did he know anything about the Davis matter? Was it he that wrote about the postal card? What had he to do with the Mutual Insurance Co., with the Manhattan, and with the Provident?

Look at the hypothesis presented by Mr. Robeson—these three companies, with their millions of gold, conspiring with this poor huckster, Thomas Graham, to cheat this defendant out of \$26,000! Upon a corroboration of this confession it is that we rest our case and ask you to convict this man.

It is useless for me to go over all this testimony; it is as familiar to you as it is to me; but let me present to you the hypothesis of the State. It was never the intention of Benjamin Hunter to have anything more to do with this murder than to plan the crime and employ the assassin to do it. And with this thought in view, it was his earliest business to fix an alibi. You will recollect that he went to Virginia, and then it was that he expected the crime to be committed, and when he returned and found that the deed had not been done he immediately goes hunting up Tom Graham. The murder is then arranged for Tuesday night, and Mr. Hunter, still prepared with his alibi, has a company of friends at his house that evening.

Why were two weapons taken across the river? The hammer had been prepared, but Hunter, having heard Armstrong say, when told Davis was poor and a communicant of his church had loaned him money, that he was almost induced to throw the matter up, then it was that Hunter saw the necessity of having the deed done at once, and, fearing lest Graham might forget to bring the hammer, procured the hatchet, branded it "F. W. D.," and brought it to Graham on the night of the murder.

A great deal has been said about the unnaturalness of the

manner in which Hunter solicited Graham to do the deed; but when it is looked at in the right light, it is the most natural way in which it would have been done. Hunter was an old boss of Graham, and he not only tells him what he must do, but he tells him that Armstrong is a bad man and owes a great deal of money, and that it will be better for Frank if he is killed.

If you believe the testimony of Mrs. Ulrich and Mrs. Ewell, you cannot but believe that Hunter was holding constant interviews with Graham for weeks previous to the murder. On the Monday previous to the murder, he testified, Mr. Hunter gave him a postal card, which was that he (Armstrong) would be over to Davis' house on Tuesday evening, and that this card was addressed to Ford W. Davis, of Camden. Now, this is a very important link in this case. Now that Tom Graham had that postal card there is no doubt, because we have produced it through the instrumentality of Ford W. Davis. When Thomas Graham was arrested and brought to my house, that was the first intimation that we had that that postal card existed. When we got it we found it was identical with what he told us it was. Now, then, where did he get it from? Was he under such terms with Armstrong that Armstrong would give it to him? He says he got it from Benjamin Hunter, who requested him to post it. Who was the man, admissibly, who went down on that morning to get Davis' address but Benjamin Hunter? It was Benjamin Hunter who made Armstrong write that letter, for he feared that Armstrong, in his weakness and in the kindness of his heart, would fail to visit Davis on that night.

Mr. Graham testifies that on New Year's evening Hunter gave him the hammer and he took it home, and in this he is corroborated by his wife. He says that Mr. Hunter made various appointments with him at Mr. Hughes'. We had never heard of Mr. Hughes until Graham told his story; and what was the result of an investigation in this regard on the part of my faithful assistants, the sheriff and detec-

tive? Why, they found that Hunter and Graham had met there on frequent occasions. Graham also swears that on one occasion he received a card from Mr. Hunter requesting a meeting at Hughes'. Isn't he corroborated there by his wife, who says that she received the card and gave it to Tom? He says on that morning he met Hunter at Sixteenth and Arch streets, and there he told him the lie in which he admitted going over to Camden on the previous night, when Hunter said he must see about it; then he agreed to meet Hunter again and did so. The defendant admits being there that morning, and admits the reception of that bogus letter. There is a corroborative fact which shows the truth and strength of his testimony. Graham says they met at Eighth and Pine streets, and then went to Mrs. Spellissy's to get a hat, giving a \$5 note for it. Mrs. Spellissy admits this fact, and say that she can't fix the time, which proves the truth of that part of the story. She also says at the time of the purchase he left behind him his black silk hat. On the next morning when Hunter went there for his high hat she recognized him and knew what he wanted and gave him his hat. Then he went into a long conversation with Mrs. Spellissy, when he told her just a little lie, a little joke, saying he was going down the Neck, when he knew he was going to Washington and wanted the hat for sleeping in. He acknowledged here that he got the hat, but he denies as to the day. Are you to believe this man, who is swearing here to save his life, or the two witnesses who came here so unwillingly and whom we were forced to go to Mahanoy City to find? He denies positively that he left his hat there then; he denies the conversation with Alice Coleman. I contend that the testimony of these two people confirms and corroborates the confession of Thomas Graham.

The next feature of Graham's testimony I would call your attention to is Hunter at Eighth and Sansom streets. Then he is so disguised that Graham scarcely knew him. He might have stood there all night if he (Hunter) had not given the signal, for Graham says when he was given a pre-

concerted signal he walked over and said, "Why, Mr. Hunter, I scarcely knew you." Then the hatchet is given and they start down Sansom street, when the two workmen come downstairs and Armstrong follows from his place of business, and the conversation took place between Edgar and Pfeifer. The counsel on the other side tell you that this conversation was published in the newspapers, and there Graham learned it. Now, the fact is that this conversation was never published till it was given here on the witness stand and Graham had no possible means of knowing anything about it. Is not that in itself corroborative testimony? We are told that Hunter said to Graham when they reached the place that "Armstrong will be done soon; he is washing himself." Could a man have made such a statement as that if he had not known the habits and customs of the man he was speaking of? He saw Armstrong from the window. A man who was disposed to tell a lie would have merely said, "Armstrong is wiping his hands and will probably be down soon." But Hunter knew Armstrong's habits, and when he saw him at the window knew that he had washed and was preparing to leave.

They came down to the ferry and took the 22 minutes past 6 boat. They came to Camden, got into a car—that is, Hunter and Armstrong—and proceeded to the place where poor John Armstrong was given the blow.

Is he corroborated in this? They got into a car. Every one here knows Sam Mortland, and no one would attempt to saddle upon his shoulders a lie. This man, whom we all know, do you believe he would come here and swear to a lie? If he had been swearing to a lie he would have been able to give you a full description of the men, but he can only recall the fact of seeing the two men, one with a slouch hat and the other a little deaf. This is the uncertainty that naturally surrounds the story of a man telling the whole truth as far as he knows it. Graham says that Armstrong was facing the alley. And is it not natural to suppose that he would be, for he was standing there in front of that alley,

facing it, waiting for his friend Hunter, who had made an excuse to retire up that alley for a few minutes. Is not this corroboration?

Well, then, still another. At the time of the discovery of this man mortally wounded there were some weapons found, among them a hammer. When that hammer was found there was a place where a ferrule had been on it, and it looked as though that ferrule had been off for years. But upon an investigation the ferrule was found just in the neighborhood of the killing. Graham, in that "star chamber investigation," as it has been called, "when we were all steeped in whisky," said there was a ferrule on the hammer, and I asked him if he was not mistaken, if it had not been off for a long while, and he said, "No, it was on that night, but it slipped off."

As to the denial of Hunter, I do not propose to say much, but this man is now under a grave charge, and if his denial is believed then all the witnesses produced by the State are perjurers.

As to the proof of character, if I myself were to commit a crime of such magnitude I would have little difficulty in bringing scores of witnesses to prove my character. And if any one of you were so accused, you could show that such a crime was contrary to your disposition and character. Any of us could do so. My friend, Colonel Scovel, would not find it so easy a task, for he is an exception.

Finally they come to what they dignify by the name of an alibi. What is an alibi? Why, the ability to prove the impossibility of a man to be in two places. Have they shown it was not possible to be in Camden, as we have shown it was? The attempt to prove an alibi proved to be a signal failure, for we have shown that Hunter could have been in Camden, get in the car, as Conductor Young said he did; get home at the time his family say he did, and still have four minutes to spare. Now, then, what becomes of the alibi? If that faithful man Epp had gone to Hunter's house on the morning after the murder and said he could locate

Hunter the night previous, why did he not come here and so testify?

We have heard the counsel say, "Where is this man and where is that man?" But I say here, Where is Epp? Why didn't they bring him forward on this stand and swear to it? Then they say Hunter went into the house of his friend, Ernest, and borrowed a newspaper on Wednesday night, but why didn't they bring Ernest here? Where is he? I pleaded with Mr. Ernest almost on my knees, as I did with Mr. Epp, to come here and testify, but they refused. Why? Because they knew it was Tuesday, not Wednesday, that he went to Mr. Epp's and borrowed the paper from Mr. Ernest. To all this the defense brings forward an old diary with the entry in it, "At Epp's house, 6 o'clock." This is on a Tuesday night in August. If any one of you intended to put an entry for an appointment you would have put it on a night that was current, no matter what the date; you would have made it Wednesday night.

Nearly every one has either read or heard of that beautifully told story of Goethe—how that Satan, in the man form of "Mephistopheles," tempted the aged "Faust," and, having won him by the gift of rejuvenescence, seduced and led him to the commission of bad deeds, which finally culminated in the death of the brave "Valentine" and the ruin of the artless "Marguerite." This story has become the subject matter of the poet and the playwright, and for years both saint and sinner have denounced in concert this foul temptation.

In the progress of this trial, gentlemen, a story of temptation has been disclosed so serious in its details that "Faust's" temptation, in comparison with it, falls almost into insignificance. It is the story of a man who has passed, long passed, the meridian of life, respectable as the world goes, the father of a family, who, taking advantage of his knowledge of the weakness and dissipated habits of comparatively a young man who had formerly been his apprentice for a series of years, and over whom he had thus gained an undue control,

had seduced this young man from the path of rectitude and corrupted and debased him to the extent that, admissidly, he became a murderer. There was both lust and love—these almost irresistible motive powers—in Faust's temptation. In this there was only the old serpent and the all-potential influence of the strong mind over the weak subject. But it is in its results that this temptation has become so baneful.

I viewed with intent curiosity, aye, with heartfelt compassion, that long line of suffering humanity, sympathetic with the defendant, which was exhibited there during the able and touching appeals of his counsel. But, gentlemen, if I were to have recourse to this stage trick, it would take almost the whole of this State to accommodate the victims, direct or indirect, of this defendant's dereliction. I would place there, gentlemen, Demaris, with his tender wife and budding babies; and here Ford W. Davis, with his faithful helpmate and his six helpless children—like a row of steps—and here, again, in deep habiliments of woe, the widow, son, and daughter of the dead; and, lastly, there that silent, suffering, literally dying wife, with her 10 months' old darling at her breast, for whom my heart bleeds in sympathy, and who, under the machinations of the tempter, has lost all peace, all hope, all happiness in this world.

Where, prisoner, was your humanity when you wrought such wretchedness as this? Could gold compensate you? Why, you were a father, you were a friend, you were at least a man! How could you fail in all the natural attributes which God has given you?

And yet, gentlemen of the jury, the proof demonstrates that he has so failed, and it devolves upon you to tell to the world that he has done so. See to it by your verdict that you so tell it, without fear, favor, or the hope of gain. See to it that you so tell it in conformity with right and justice. And, above all, see to it that you so tell it that in the present and future no crime so horrible in its details, so terrible in its consequences, can be repeated with impunity

within the jurisdiction of this State, under whose ægis we are so proud to live, and whose just and stern standard of justice has become proverbial of commendation the world over.

My old familiar friend, whose good opinion I so value and whose friendship I revere, with whom I have wrestled so often in days gone by, and by whom I have so often been put to a disadvantage, did me but justice when he said to you, substantially, that the prosecutor, in the presentation and submission of this case, would not overstep the strict limits of his line of duty.

And yet, gentlemen, with the keenest understanding of my obligations as a lawyer, with the fullest conviction of my accountability as a Christian, with the dread perception of my duty as a man, after having weighed all the evidence in this case, and prayed unto Him from whom all wisdom comes to teach me to do that which is right, I feel it to be my duty to ask of you this man's life!—as a palliation in obedience to the mandates of an all-wise God, of our brother's blood, so ruthlessly shed; as a vindication of the law of this State, outraged in its most sacred functions, and as an example to the old and young, the strong and the weak, the rich and the poor, the good and bad, of the implacability of justice and the certainty of speedy and condign punishment for such violations of the majesty of the law.

JUDGE WOODHULL'S CHARGE.

JUDGE WOODHULL. Gentlemen of the jury: Benjamin Hunter, the prisoner at the bar, stands indicted at the present term of this court for the murder of John M. Armstrong, in the county of Camden, on the 23d day of January last. About six o'clock on the evening of that day John M. Armstrong, a respectable citizen of Philadelphia, doing business at No. 710 Sansom street, in that city, left his office, and, within less than an hour afterward, was found by strangers near the corner of Fifth and Vine streets, in the city of Camden, desperately wounded and apparently near to death. He

was unconscious when found, and so continued until a few minutes before six o'clock on the morning of the 25th of the same month, when he died.

He had received, apparently, from some hand, three crushing blows upon the head, one on the left temple, as you will remember, another a little higher upon the fore part of the forehead, and the third on the top of the head a little back of the middle. These wounds had been inflicted apparently by the use of some blunt instrument like a hammer or a hatchet, and each one of them was probably, if not necessarily, a mortal wound. There can be no doubt these wounds were inflicted purposely and with deadly intent, and from their effect, within a few hours after he had received them, John M. Armstrong died.

This is the crime with which Benjamin Hunter, the prisoner at the bar, is charged. The indictment, which has been read in your hearing, is the formal written accusation made by the State against him, setting out in six different counts the crime with which he is charged; and, although the statement of the alleged crime in each of these counts differs in some respects from that contained in either of the others, you are not to suppose that these varying statements are intended to prescribe, nor that the prisoner is required to answer for more than one crime, namely, the murder of John M. Armstrong substantially in the manner, and at the place, and at the time specified in each of these counts. It is not necessary in this case that I should trouble you with any remarks upon the law relating to the crime of murder other than to say that "murder is the unlawful killing of another with malice aforethought," and that our law, as it now stands, recognizes two degrees of that crime, declaring that all murder perpetrated by lying in wait or by any other kind of willful, premeditated killing shall be deemed murder of the first degree, and that all other kinds of murder shall be deemed to be murder of the second degree, and that the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof,

designate by their verdict whether it is murder of the first degree or of the second degree. It must not be supposed, however, that it was the intention of the law that a jury should exercise arbitrary discretion in this matter, or, indeed, any discretion at all. The question which is left with them to be determined is simply a matter of fact upon the facts and evidence in the case.

If they believe the killing in any case to have been willful, deliberate and premeditated they have no more right to find the prisoner in such case guilty of murder of the second degree than they have the right to acquit him altogether. In the present case the prisoner, if guilty at all, must be, upon the theory of the prosecution, guilty of murder of the first degree. If the State has not shown itself to be entitled to a verdict against the defendant of murder in that degree it is entitled to nothing. If it should not appear that the killing was willful, deliberate and premeditated, and shown to be murder of the first degree, justice would demand a full acquittal of this prisoner.

When Benjamin Hunter pleaded not guilty to the indictment the effect of his plea was simply and wholly to deny that he had been guilty of this murder. Whether he is guilty or is not guilty of the alleged murder is the momentous issue which you have been severally sworn to try.

The two propositions which the jury were to consider were: First, Was Armstrong killed? Second, Did Hunter kill him? As there would probably be no trouble, on the part of the jury, in answering the first question, the second became the great question for the jury to consider. If Graham's testimony could be taken as worthy of belief there would be no need of all the little connected circumstances which had been put together until they made a strong case of suspicion against the prisoner; but the question was now on the testimony as a whole.

It is said that this testimony of Graham is entitled to little or no weight; but this testimony, you will recollect, was a very marked point of attack on the part of the defense. They

attacked with great vigor the testimony of this accomplice, because he is really a principal in this case by his own confession. They attacked him as utterly unworthy of credit. It is necessary that the court should instruct you to some extent in regard to your dealing with the testimony of this witness. There can be no doubt that a witness standing in the position of Graham, who confessedly committed the crime, should be regarded with a great deal of caution. It certainly is incumbent upon a juror to scrutinize closely and weigh well the testimony of a witness standing in that position; but, at the same time, it is my duty to say to you that he is a legal and competent witness, that the law makes him such, and all that I need say to you in regard to the corroboration of his testimony is that in this case, under the circumstances, he is so far corroborated that his testimony is to be taken as legal and competent testimony, not conclusive, but testimony which the jury have a right to examine and to use according to their own judgments, to determine its value and to give to it such weight they think it is entitled to. It has gone far beyond the point when the Court ought to say to you that it would not be safe to convict a man upon the testimony of a man who is an accomplice or a participator in crime. This testimony of Graham, direct and positive as it is, and taken as it is with all the circumstances which surround the man who gives it, is a part of the material from which this jury must make up its judgment as to the guilt or innocence of this prisoner; they are to look at all the points wherever it is claimed to be corroborated. They are to consider whether the argument used on the part of the defendant, that it was a made-up and contrived story by this man Graham, himself being, perhaps, the sole guilty actor in this transaction, for the purpose of bringing in Hunter with him with the hope that he might, perhaps, in that way diminish the punishment which the law would impose upon him; that it was done with a view to save himself, and that he has in this way, knowing all the circumstances necessarily of this transaction, because he was

an actor in it, chosen simply to fix upon Benjamin Hunter as a second actor, hoping and trusting that in that way he would win some immunity for himself.

That I understand to be the argument. You are to consider that, and to consider every argument that has been urged upon you in reference to the value and effect to be given to this testimony; but you are to look at it in such a way as to satisfy yourselves that it would, at any rate, be possible that a man in the circumstances of Graham could contrive such a story on a sudden, because you will remember that when he came over here there was not the slightest indication that he had come for the purpose of making a confession. He was brought here against his will, but consented, to be sure, when he found there was no help for it; and then, when he came over here, began to deny all knowledge of the transaction, and all knowledge of Hunter's connection with it for the space of two hours, and then suddenly stopped, as if from some casual question he caught the idea that the State was already in possession of information sufficient to convict him of this crime, and then he made what he has called his "clear confession," from which, in substance, he has not varied since. Is it reasonable to suppose, if it is possible, that a man under such circumstances could on a sudden change completely the course of his narrative, and contrive and put together such a narrative as he gave in the second place, and which would fit in with all the facts and circumstances which can be traced in connection with it, and of which there has been no contradiction? Is it reasonable to suppose that he could have done that? You are to consider that fact. If he could just as well have put in another man, then his testimony probably would be entitled to very little weight, if it was merely dependent upon his option. But just test the thing by asking yourselves what other man could have been put in that narrative and fitted there as this defendant seems to fit. Suppose Graham had chosen that either Davis, Demaris, or any other of the score of gentlemen who have appeared in

this case should be substituted by him in place of Benjamin Hunter, and in examining this question you will observe whether any one of them could have filled that place in the way that this prisoner seems to have filled it. This is the only way of testing the directness of this man's testimony. There were two men engaged in the commission of this crime, we may assume from indications which have been referred to in the course of the trial, and we know that one of them was Thomas Graham.

It is not for us to ask who the other man is; our inquiry does not have so wide a range as that. We are not investigating in a general way to ascertain who it was, but simply to ascertain whether Benjamin Hunter, the prisoner, was that second man. If the evidence of Graham, and all of these corroborating circumstances satisfies you that he was the second man, then the State's case is made out, because if he was, he was, of course, there present and took some part in the commission of the crime.

It is not necessary in dealing with the testimony of such a witness that you should feel bound to accept either the whole of it without question or to throw the whole of it away. You may see reason for distrusting some part of this man's statement, and you may see good reason for being sure that in other parts of his statement he has told the truth; and we all know that when an accomplice comes to state his own story about the commission of crime, however accurate his statement may be up to a certain point, when the matter comes to touch the man's own personal relation to the crime and the extent to which he himself engaged in it, that then the accomplice intends to favor himself and to make out that he himself was much less guilty than the other whom he has brought into the crime. So that it is not necessary for you to accept this statement of Graham as a whole, nor that every part of it is true. You may have reason to believe that he did a great deal more in the commission of the crime than he is willing to admit; or it may be that Hunter did less than he says he did. But the question is,

Was Benjamin Hunter, the prisoner at the bar, then and there present, aiding and assisting Thomas Graham in the commission of this crime? For, as was fairly admitted by the counsel who defended him, it makes no difference whether Benjamin Hunter stood in the alley, whether he stood 10 feet up the alley, watching and ready to assist in case of necessity, or whether he stood watching there 50 feet away, and that he never touched a hammer or a hatchet, nor, in fact, inflicted one of these wounds, for, in the legal aspect of this case, he would be guilty if he was there in the neighborhood for the purpose of aiding and assisting a man who was to do the work, and he must become in the eye of the law a principal in the murder, and legally as guilty as the man who delivered the blows.

I think when you come to look at the testimony of those who heard the sounds which must have proceeded from this affair, and notice how closely they connect the fall of the hatchet on the pavement with the sound of the coming wheels of the express wagon, and connect that with the testimony of Barton, who says that he sprang out and saw two men moving up toward Sixth street, you will take all these to be indications that the crime was consummated, as far as it was consummated within this jurisdiction, just within the time; and, probably—the suggestion is at least worth communicating to you—there never would have arisen any question of jurisdiction here if the express wagon had not just then happened to drive up. It was not safe to stand there any longer. The deed had been done before the wagon arrived, and the men who did it were seen by the driver passing up the street. Graham, by his own confession, was there somewhere. The circumstances to which the State has called your attention relate, in addition to the indications to which I have called your attention, to those which go to show a motive. The State claims to have laid before you sufficient evidence to show that this man had a motive, and claims to have shown you, beyond any reasonable doubt, that he (Hunter) had been planning and contriving this murder; that his was the

controlling mind; that he was the mover in all this matter; that it was he who was looking after the accomplice, keeping him in sight, inquiring for him over and over again, and that he was in this way arranging the plan which was to result in the death of John M. Armstrong.

In addition to the circumstances which connect the prisoner with this crime—and when I mention this I do not design at all to withdraw your attention from any others which have been referred to and which are so numerous in the case that I cannot go over them—you are referred to the conduct of this prisoner himself as indicating a guilty mind. Recollect the way in which he received the first announcement of the assault. You will recollect that before anything had been said about the circumstances, according to the testimony of young Armstrong and Lorrilliere—and their testimony is in the case, and you must look at it and deal with it according to what you think it is worth—they, both of them, testify that before anything had been said in regard to the circumstances of the assault, it seemed to be assumed by Hunter that Armstrong was fatally hurt. That seemed to be the impression made on their minds, and they began to talk about it almost as a thing of the past; and you must recollect those words which Lorrilliere testifies to of Armstrong being a burden to Hunter, and I think I am not mistaken in that language; and, in connection with that, you are to recollect the language which Graham says Mr. Hunter used in regard to Armstrong being a burden to him and of no use to his own family, and that Frank would be better off without him; and then, in connection with this, I dare not refrain from calling your attention to those terrible words which were uttered by this defendant at the close of his first examination here, and which were testified to by Nichols, that “Armstrong ought to have been in hell six years ago.” What does that mean? It is not for the Court to say. The Court cannot interpret such things. But what is the interpretation which reasonable men are to put upon such words in the mouth of a man so quiet and gentle and

tender and loving in his disposition, as here, by multitudes of the most respectable gentlemen, Benjamin Hunter has been testified to be?

I would gladly refrain from calling the attention of the jury to these words. I notice that they have not been referred to; but it seems to me that, being in the case, the jury ought to have their minds directed to them; and that they ought to put upon them such interpretation as they will fairly bear, but nothing beyond that. If these words were the result of a sudden impulse forced from the breast of a man who felt that he had been persecuted, and who was desperate, and they indicated nothing beyond this, then, of course, you would consider them as of not much effect in this case; but if, upon reflection, connecting them with other words spoken by the prisoner, which are disclosed by the testimony in this case, you believe that they were simply a revelation of the true mind and heart of this man toward Armstrong, then, necessarily, they must be weighty against the defendant and go far toward his condemnation, for they would seem to show, in addition to the motive referred by the State—the gain from the death of this man to be got from the policies of insurance—that there was something else, the burden which he speaks of, upon his mind; something which seemed to force from him those fearful words which I have referred to.

The answer of the defendant consisted: First. Of the prisoner's denial of many of the material statements and circumstances alleged by the State. Hunter's testimony was competent, and should be weighed carefully by the jury, not forgetting the position in which he was placed. Second. Good character. This, also, was a proper defense. A man's reputation is the estimate other people make of his character. If the jury had been enabled, during the progress of the trial, to get a glimpse of the defendant's real nature it should be compared with the testimony as to his reputation. Third. That the prisoner could not have been present at the murder because of his presence else-

where. This was what was called an alibi, which, to be complete, should show beyond the question of a doubt that the prisoner could not by any possibility have been present at the murder—if Governor Pollock, for instance, had taken the stand and sworn that Hunter had had an engagement with him on that evening, and was closeted with him from six o'clock until seven o'clock on that evening.

I have said to you all that I think necessary for the purpose of calling your attention further to this case. The whole case is now before you. You have all the material that could be furnished you from which you are required to make up your minds as to the guilt or innocence, or, rather, as to the guilt of this defendant—whether he is proved here, because that is the question, to be guilty of the enormous crime of which he stands charged.

This is the weighty matter which is now committed to your hands. How are you to know whether this defendant is proved guilty or not? All the evidence in the case is intended to throw light, as I have said, upon the fact of his guilt or of his innocence, and you are to observe the effect of it in your own minds. The question is: What conviction, what belief has been wrought in you by all the evidence in the case? There is no reason why you should be in doubt about this—I mean in doubt about the state of your own minds—because you observe that it is the state of the juror's mind which is to be looked at, and the juror himself alone can look in his own mind and determine that measure of proof which the law requires, which is that which satisfies the mind of the juror beyond a reasonable doubt of the guilt of the defendant.

A juror, in order to determine what he does believe in regard to this matter, has simply to look within himself, to use that inward sense by which a man knows what he thinks, what he remembers, what he believes, and so you, looking within yourselves, examining the effect of all this evidence upon your minds, must determine for yourselves what you do really believe about this thing, and, if the

evidence in the case fails to satisfy you beyond a reasonable doubt that this defendant is guilty, he has no reason to ask for mercy, justice requires his acquittal.

If you fail to be satisfied from all the evidence in the case of the guilt of the defendant as to this charge you are bound to acquit him; but if, on the other hand, you believe beyond a doubt—if you have no doubt about it, but have a firm and settled belief wrought in your mind by the evidence in the case that he is guilty, every consideration of duty, safety and honor requires you so to find by your verdict. Gentlemen, the case is in your hands.

One moment, gentlemen. I have been requested on the part of the defense to charge you on several propositions of law which I will read:

First. That the presence of the accused within aiding distance is necessary to make him a principal, and necessary to his conviction on this indictment.

That I have already said.

Second. That presence is a material fact to be proved by the State, and like every other material fact necessary to make out the State's case, must appear beyond a reasonable doubt.

That I have already said.

Third. That unless the killing by the prisoner is admitted the legal presumption of innocence remains, to be removed only by proof which shows the contrary beyond a reasonable doubt.

That, in substance, I have said.

Fourth. That if on the testimony in the whole case there remains any reasonable doubt of the prisoner's presence, he must have the benefit of this reasonable doubt.

That I have said.

Fifth. That the evidence of the accomplice should be corroborated, not only in the details of the crime and the circumstances which surround it, but also as to the statements which relate to the person of the accused and bring

him present at the killing. That I decline to charge except as I have already charged.

Sixth. That under the proof in this case, that the death occurred in Pennsylvania, there can be no conviction for murder under this indictment—that the highest crime shown to have been committed within the jurisdiction of this court is the crime of assault and battery with intent to kill.

That question was decided in the beginning in this case, and it is one which ought not and which need not trouble you in the least. That will be settled by the court above, and I decline to charge as requested, but it is nothing that concerns the jury.

Seventh. If the evidence of alibi throws a reasonable doubt on his presence here he must have the benefit of it.

I think I have substantially said that. That is what I meant to say. It is a part of the whole case; and if, from the whole case or any part of it, there arises a reasonable doubt, the defendant is entitled to the benefit of it.

THE VERDICT.

At 4:30 p. m. the *Jury* retired and in a little over an hour returned into court.

JUDGE WOODHULL. Gentlemen of the jury, have you agreed upon your verdict?

The Foreman. We have. *Guilty.*³

³ It now comes out that from the time the Commonwealth and the defense respectively, had rested their cases, and before a word of argument had been heard, the jury, governed solely by the evidence, was almost a unit against the prisoner. They were in fact, ready to convict him without leaving their seats, but refrained from so doing to avoid creating public excitement. The deliberation that preceded the first ballot was extremely brief. When taken, the vote stood eleven for conviction and one blank. An hour was then suffered to elapse, and the second and final ballot was then taken and found to be unanimous against the prisoner. In about one hour and fifteen minutes, having waited during that interval only, lest they should seem to the public to have been in unseemly haste, the jury announced that they were ready to render their verdict. *Philadelphia Inquirer*, July 4.

THE SENTENCE.

November 10.

JUDGE WOODHULL. The Court has overruled the motion in arrest of judgment and for a new trial.

The first ground in the prisoner's behalf is because the case was not at issue, and this same ground is implied and included in the second, because, after the withdrawal of this plea of not guilty by the prisoner, a motion to quash the indictment was substituted and overruled, and, after the decision of the Court, no second arraignment occurred and no second plea was taken, so that no issue was raised between the State, and, therefore, the jury had nothing to pass upon.

We think this is a mistake in fact. The plea was withdrawn simply for the special purpose of allowing the prisoner the privilege of a motion to quash the indictment, which regularly should have been made before the plea was put in. The withdrawal of the plea was not absolute, and the record shows that the plea stands precisely as before that motion was made. It was not stricken from the record, which shows conclusively that there was no absolute withdrawal, but it was for a special purpose, and that purpose being accomplished, the plea was made as if no such withdrawal had ever been made. In some courts, as I understand, this same result is reached by the court declining to allow the prisoner to withdraw his plea, so that it seems to us to make no difference. If the motion prevails in such cases the indictment fails, and the plea falls with it, but if a motion fails the indictment stands and the plea stands, and the issue remains just as it was before the motion to quash the plea.

We think, therefore, that the defendant has suffered no injustice in this case; that the case was always at issue, that after a motion to quash was refused it was so understood to be by his counsel, and one of them said, "We will renew our plea;" it did not affect the case in any way, but simply acknowledged what was the fact, and the legal effect of all that had been done was that the case was there and then ready to be tried. We feel constrained, therefore, to refuse both of

these motions—the motion in arrest of judgment and the motion for a new trial.

Mr. R. S. Jenkins. I move that sentence be now pronounced.

Mr. Robeson. I now take leave to move the Court for judgment for the prisoner *non obstante veredicto*—that is, that the prisoner do go thereof without delay, notwithstanding the verdict against him. I do this because it is clearly established, and, indeed, admitted in this case, that, though the fatal wound, by whomsoever inflicted, was stricken in New Jersey, the person stricken died out of the jurisdiction of this State, and in the State of Pennsylvania and under the jurisdiction of her laws.

JUDGE WOODHULL. The motion is overruled. The prisoner will rise. Benjamin Hunter, you have been convicted of the willful, premeditated murder of John M. Armstrong. You have been convicted by the law, and by the law you must suffer death. Have you anything to say why the sentence of the law should not now be passed upon you.

Hunter. Nothing that has not been said by my counsel.

JUDGE WOODHULL. Nothing then remains for me except to pronounce, in the name of this court, the dreadful sentence and judgment of this court, which is, that you, Benjamin Hunter, return to the prison from whence you came, and that you there remain until the tenth day of January next, in the year of our Lord, eighteen hundred and seventy-nine. From thence you shall be taken to the place of execution, between the hours of ten o'clock in the forenoon and two o'clock in the afternoon of the same day, to be hanged by the neck until you are dead, and may God have mercy on your soul.

Hunter appealed to the Court of Errors and Appeals, where, at the November term, 1878, the case was argued by Mr. Robeson for the Prisoner and by Mr. Jenkins and Attorney General Stockton¹ for the State. The principal grounds for appeal were the admission on the trial of the declarations made to his wife and son and his letter to his wife that Armstrong was going the night of the murder to the

¹ STOCKTON, JOHN POTTER. (1826-1900.) Born Princeton, N. J.; was minister to Rome and United States Senator, 1865-1875; Attorney General New Jersey, 1877-1900; died in Jersey City.

city of Camden to meet Hunter there. It was also strenuously argued by Mr. Robeson that as the victim died in Philadelphia he should be tried in Pennsylvania and not in New Jersey. But the Court Chief Justice Beasley, delivering the opinion, unanimously affirmed the verdict and judgment.²

THE EXECUTION.

Hunter was hanged on Friday, January 10th, 1879. The following description of the execution is found in the *Philadelphia Inquirer*, of January 11th:

Camden is a sedate and sober little town, and seldom is the equanimity of its people disturbed by sensations. Yesterday, however, was, of all the famous days in the town's history, the most memorable, and the excitement of its people ran high. The hanging of a murderer has taken place in Camden on only one occasion previous, and that was when John Ware was swung into eternity for the killing of his father. But Benjamin Hunter's crime was so peculiarly atrocious, so characterized by the most aggravating enormities, that the whole community, with a unanimous voice, demanded that the extreme sentence of the law, as imposed by the court, should be visited upon a criminal whose cool, deliberate and bloodthirsty deeds stamped him as a murderer of the blackest dye. The sun was not very high yesterday morning when groups of curious spectators began to cluster around the vicinity of the gloomy and forbidding jail. The "entire police force of the city of Camden" (sixteen in number), were stationed around the square, and a number of citizens were sworn in as deputies to the sheriff.

Long lines of men, women and children were to be seen on Market and Federal streets, peering anxiously at the courtroom windows, and eyeing with envy those who, in their opinion, had been so lucky as to secure the precious pieces of pasteboard that admitted them to the building. The bearers of tickets were first admitted through a basement door on Fifth street, and the first sound that struck their ears was the merry singing of a half intoxicated individual who had been shut up in one of the lower cells. After passing upstairs the privileged ones were allowed finally to surrender their tickets to ex-Sheriff Daubman.

At twenty-three minutes past eleven the crowd was hushed into silence by the noise of shuffling and scraping on the stairways leading to the cage. Then Sheriff Calhoun was seen moving quickly toward the gallows, followed by ex-Sheriff Daubman. Three deputies followed, carrying in their arms an awful object in human shape. A thrill of horror ran through the crowd, and there were few faces that did not grow pale at the unexpected sight. It was Benjamin

² 40 N. J. L. 495.

Hunter. But what a contrast to the bold, self-possessed man of a few weeks before. His ghastly face, firm and rigid as stone, wore an expression of unutterable pain, agony, and despair. There was a stillness and a sinister darkness on those pallid, stony features, that gave him an aspect of horror which will never be forgotten by those who saw his countenance. It was wild, haggard and ghastly with supernatural fears, and yet there lurked upon it that look of selfish cunning which was his foremost trait. His head rested on his chest and his eyes were closed fast. In an instant the thought seemed to come over every one that the man had been drugged.

There he was, held up as if he were a corpse. Not a sign of life was visible. Meanwhile Sheriff Calhoun quietly adjusted the noose, and deputies pinioned the legs of Hunter. There were no prayers, no harangues, no last words. The officers of the law did painful work with the utmost celerity. "Benjamin Hunter," said Sheriff Calhoun in a loud tone of voice, "have you anything to say." Not a sign of animation was visible. A second time the question was asked, and those who were near him thought they saw the lips quiver as if attempting to articulate. Immediately the painfully suggestive white cap was drawn over Hunter's head. An unearthly stillness pervaded the corridor. Sensitive men hid their faces to avert seeing what was to come. A quick clicking noise was heard. The fatal rope was cut, and the weight fell. Then followed for a moment one of the most revolting scenes that has ever attended an execution. The victim of the noose had been raised from the floor hardly a half foot, and, instead of being lifted high in the air, it seemed as if he would struggle on the floor and choke slowly to death. But the sheriff and his chief deputy, with a rare presence of mind, seized the other rope, and, pulling it hand over hand, lifted up the body about four feet from the ground as if it were a bale of cloth. There were no convulsions of the legs nor twitchings of the fingers, only three or four deep heavings of the chest. The body then became perfectly still.

Dr. Morgan of Camden, began to time the pulse. At thirty-six minutes past eleven, when Hunter was swung up, it beat 64 pulsations, and the next minute had increased to 102. Three minutes later it was 144, and then it began to decrease from 128 to 92, then to 80, and finally to 34. Fourteen minutes after the body had been swung the pulse was gone. But the physicians continued to apply their ears to his chest, and, with a dubious shaking of the head, pronounced that life was not yet extinct. The body continued to hang, twirling around once or twice, until six minutes after twelve, when it was cut down.

A number of medical gentlemen, among whom were Dr. Thomas H. Andrews, of Jefferson, Dr. T. G. Young, of this city, and Drs. Godfrey, Melcher, Banes, Tomlinson, Pancoast, Mulford, Armstrong and Coroner Izzard of Camden, made an examination. Their unanimous opinion was that Hunter had been strangled and that he suffered but little pain. In medical nomenclature the immediate cause of death was asphyxia, produced by compression of the thy-

roid cartilage closing the trochea. Over the ankle of the left leg was a bloody incision, which was evidently a trace of the suicidal attempt on Saturday.

A week before the execution Hunter's keeper noticed him sitting in a corner of his cage near the stove and complaining about the lack of heat. He was advised to wrap a blanket around him, which he proceeded to do. Presently the man who was on watch began to grow suspicious at the movements of the prisoner's feet. "I am doing nothing," said Hunter, when the man questioned him. This reply only increased the keeper's suspicions, and he rushed into the cage, tore away the blanket and found a stream of blood flowing into a spittoon from each of Hunter's ankles. In his hand was a piece of tin with a jagged edge. His pulse was beating violently, and he was laboring under intense excitement.

Dr. Meigs of Camden, was sent for, and when he examined Hunter he found that he had been hacking at the arteries of his ankle. He had already lost a pint and a half of blood. In five minutes more," said the doctor, "he certainly would have died." The prisoner had managed to get hold of a tin cup, from which he broke the instrument of his attempt to kill himself. The doctor, in order to guard against the ill-effects of the loss of blood, administered stimulants among which were copious injections of whisky.

It was after Hunter was placed in the iron cage, out of which he was carried yesterday to the fatal rope, that he gave his counsel the full truth about the part he had played in instigating and having consummated the fiendish deed of blood, and then he but confirmed, as stated above, what had already been given to the public by Thomas Graham. The principal in this infamous crime thus explains how he came to think of perpetrating it: "Armstrong owed me money. I loaned him over \$5000, and took an interest in his business, and beside, he and his brother owed me nearly \$2000 more on other matters. He never would give me any satisfaction about this money. I couldn't get it back, and he treated me coolly after he got my money, even passing me in the street. Armstrong's wife's brother, Mackellar, always said Armstrong was a liar, and I found it so. He promised to pay me my money, and never did. I used to get almost crazy thinking about this, for some of this money was my wife's. Armstrong was ambitious to live in better style than he could afford. His music business was not paying, and I saw my money going to keep up his style. Sometimes, after he moved into his Sansom street place, Armstrong wouldn't even speak to me."

Hunter said that, thinking over these things, made him so angry that at one time he went into his barn with the intention of committing suicide, but he took a second thought, and concluded he would get Armstrong to insure his (Armstrong's) life for the amount of the debt. This was done, and then it was that Hunter, according to his own story, commenced to think seriously of having Armstrong put out of the way. He went to Graham, and told him Armstrong must be killed. At first, the arrangement was that Hunter was to

be absent in Virginia when the deed was done. He purchased the hatchet at a junk shop on South Broad street, in this city, and took one of his own hammers. He gave Graham some money, and went to Virginia, but Graham's heart failed him, and the deed was not done at that time. Hunter was not very definite about just how and when he struck Armstrong when the latter was waylaid in Camden. With trifling exceptions, the statements of Hunter and his accomplice agree, except upon this point, which is one that Hunter did not appear to care to dwell upon.

He denied, however, that Graham had told the truth when he asserted that he had only struck Armstrong once, and that then the hammer flew out of his hand. He asserts that Graham struck the murdered man a heavy blow, and that the latter at once fell; but he admits that he crushed in Armstrong's skull, and thus rendered death certain, and in this confirms a part of Graham's statement. "When I saw Graham on the boat," he says, "I told him that I had to finish the job because he had run away." He also admits that he seriously thought of throwing Graham overboard from the boat to secure his own safety, but he finally concluded that he had nothing to fear from Graham. He rested secure in this feeling of confidence until Graham had confessed.

He admits that he purchased a soft hat at Spellissy's, on Pennsylvania avenue, and that he agreed with Graham that the signal for the latter's attack should be when he said "Yes." He also admits that he tried to set up an alibi by getting Peter Epp to assert that he was at Epp's place of business at the hour when the attack was made on Armstrong. With the same end in view he jumped into a hack as soon as the boat arrived on this side, and drove to Tenth and Filbert streets, where he took a car down Tenth street.

This will explain a portion of the testimony which seemed irreconcilable with the prisoner's presence in Camden. Epp, it will be remembered, refused to be a witness for Hunter, and made an affidavit in which he testified that he had made a mistake in saying that it was on the evening of the 23rd of January (date of the murder) that Hunter was at his place of business.—*Philadelphia Inquirer*, January 11, 1879.

THE TRIAL OF JOHN MOORE AND OTHERS FOR ASSAULT AND BATTERY, NEW YORK CITY, 1824.

THE NARRATIVE.

This and the next trial were the aftermath of a free fight between a lot of Irishmen in the city of New York on the 12th of July, the anniversary of the Battle of the Boyne. All the parties were workmen and laborers, and the scene of the disturbance was in the humble quarters of the city. Early that morning the Irish Protestants, "Orangemen," as they called themselves, were astir with their flags, their orange lilies, their fifes and drums and their shillelaghs. As they marched through the streets they shouted "Croppies," as they called their Catholic brethren, and dared them to come out. The Irishmen who believed in the Pope, and not in King William, were not to be run over without a struggle; they knew what to expect on the 12th of July. Some of them had hung green flags from their windows to show their colors. The result was a general melee, many broken heads and much gore; no one was killed. But the leaders on both sides were arrested and indicted for assault and battery. Four of the Orangemen were convicted, but the judge put off the sentence until the lawbreakers on the other side should be disposed of.

THE TRIAL.¹

In the Court of General Sessions, New York City, September, 1824.

HON. RICHARD RIKER,² Recorder.

September 13.

The prisoners, John Moore, John Mullen, John Lowry and Henry Bush, had been indicted for assault and battery on

¹ Wheeler's Criminal Cases. See 1 Am. St. Tr. 108.

² See 1 Am. St. Tr. 361.

James Murney in the city of New York on July 12, 1824. They pleaded *not guilty*.

Hugh Maxwell,³ District Attorney; *William Sampson*,⁴ *Robert Bogardus*⁵ and *Thomas A. Emmett*,⁶ for the People.

*David Graham*⁷ and *Pierre C. Van Wyck*⁸ for the Prisoners.

MR. SAMPSON'S OPENING.

Mr. Sampson. This is an indictment for an assault and battery, committed in the village of Greenwich, on the 12th of July last. It had been termed a squabble, but the Court would see by the evidence that it was something more; it was an affray in which the lives of a number of people were put in jeopardy. On that day the village of Greenwich was alarmed by a new kind of celebration, unknown in this country. In this land of freedom we have not been accustomed heretofore, to witness such a celebration. If mistaken zeal and religious liberty are allowed to prevail here, in what country upon the face of the earth may it not prevail; where can mankind find safety? This riot and assault and battery was committed by a number of Irishmen. They came out in the morning of the 12th in a body—they are known by the name of Orangemen—carried flags and emblems of their order. They cried out for croppies—they hallooed, “come out papists”—they cried out for King William and King George, and brandished their weapons, and terror and dismay followed them wherever they went. There is holiness in the cause of Ireland; posterity will discriminate between him that seeks blood, and the friend of mankind. You must, gentlemen of the jury, put these illegal associations down; you must avert the arm of the sanguinary

³ See 1 Am. St. Tr. 62.

⁴ See 1 Am. St. Tr. 63.

⁵ See 1 Am. St. Tr. 718.

⁶ See 1 Am. St. Tr. 63.

⁷ GRAHAM, DAVID (1808–1852). Born in England; came to America and admitted to the New York bar; was professor of law in the University of New York, and author of several law treatises. Died in Nice, France. See 3 Am. St. Tr. 304.

⁸ See 10 Am. St. Tr. 567.

bigot who would drench your country in blood—you must convict. By permitting these unhallowed institutions, these bloody and reckless associations, which have distracted and torn to pieces the fairest country upon the face of the earth, you would strangle justice, you would murder innocence. The intention of the defendants, gentlemen, constitutes their guilt—it is your duty to search out the intention—to seek after truth. You, gentlemen, will see by the facts, who are delinquents, who has been guilty of this crime. I will prove it to you—I will show it to you in broad daylight. I will state to you the facts, gentlemen. On the 12th of July, after the hearts of our citizens had been warmed by the celebration of that anniversary that had shed light upon the world—another sect—another sect, gentlemen—I do not know, I cannot speak of them—so bloody and stupid are they, and—

Mr. Graham inquired if *Mr. Sampson* was opening the case of the defendants, and whether he intended to embrace other acts than those connected with the assault and battery.

Mr. Emmett. *Mr. Sampson* cannot be interrupted, unless misstating facts.

The COURT. We cannot stop the counsel, unless we see something wrong. It appears by the record to be an assault and battery, but it may be necessary to state other facts to explain the facts of this case.

Mr. Sampson. If I had the mouth of the giant in the fable, I could speak at one word all the enormity of the defendants; but I must now speak of one at a time. My character is known—I have been here twenty years, and it is some proof that I shall not talk nonsense. The village, as I said before, was disturbed by a new celebration—it was the celebration of Orangemen—they cried out for croppies, that they might attack them—United Irishmen, that they might lay them low. They cried for King William and King George. If the cry was to tear down bawdy houses—disorderly houses—if it was to remove some nuisance, or redress some complaint, the cry would have been known—it would have been understood; but this cry was the cry of war and extermination; this cry has occasioned the shedding of human blood, from the time of

King William to the present. It will stamp them with shame. It happened just before the arrival of that national guest, that has united every heart. And it is singular, that this great event should have been ushered in by the cry of these murderers.

The 12th of July has been, in every point of view, disastrous to unhappy Ireland—to that country it has been a curse that has hung upon it for centuries, and has drenched it in blood. King William tried to win them to his favor. If he had heard them crying out in such a manner, he would have been ashamed of them—would have disowned them. They are enemies to the rights of the people—like pirates, enemies to all mankind. Let them celebrate the anniversary as they may, it is disloyal and odious; they disgrace George IV by calling on him. On this fatal day they cried for war. They showed their colors. I have heard, gentlemen, that when Robespierre lay dead, to such a degree had the fears and apprehensions of the people been excited by his bloody acts, that as they approached him, they thought they saw his limbs move—they thought the unnatural monster was reanimated, and recoiled back in horror. Where these bloodhounds move, is horror and death—the innocent tremble with fear, and are faint with horror. The distracted mother clasps her infant to her breast, and in the agonies of her heart, as she runs, exclaims, the bloodhounds have come again—they have tracked us out!

It would appear that the prosecutor in the morning heard a gun fired; that soon after he saw a yellow flag displayed—signals of death and destruction. He well knew their meaning—he knew what they had been in Ireland—he knew what they would be here—he knew they would begin in riot, and end in murder. He went to the police in company with some others, and there told his story, but the officers of justice did not know the danger that was impending; they were not familiar with scenes such as were about to be acted.

They replied to the entreaties of the prosecutor, come and tell us when they do any mischief. The peaceable Catholics returned to the village—they were not disposed to violence—

they struck no person, they gave no insults while the Orange flag was flying—while it was raised to provoke and insult them into violence, they meditated no mischief, and did none; they were not armed. It would appear that the prosecutor and one Cassidy went up to the Orange party and entreated them to take down the bloody signal. They were knocked down with clubs and billets of wood, and with brickbats, and some of them almost murdered—they beat to insensibility a pregnant woman. Their object gentlemen, was blood, and their motive, extermination.

I could, gentlemen, if sworn as a witness, detail to you such scenes. I could tell you of crimes that would draw tears from the hardest heart, but it is not agreeable that counsel should be witnesses. I do not wish to rely upon myself. I will read to you the words of an English lawyer—an extract from Plowden's History of Ireland.

Mr. Graham. I object to reading history. It is not evidence in a case of assault and battery.

Mr. Sampson. History is evidence—the highest evidence of the facts therein stated. This point has been decided in the British Parliament. I propose to read a resolution of thirty-six Protestant magistrates.

Mr. Graham. The indictment against the defendants is for an assault and battery. History can have no relation to the point in issue. Plowden is a partisan; he is under a prejudice, and it is not considered a fair history. His work has been reviewed, and is not considered authority.

Mr. Emmett. Plowden was employed by the English ministry, and wrote his history. He was an Englishman, and went over to Ireland to collect facts for his work with a mind unprejudiced. He was selected to be their historiographer, and what he states is not his own opinion. He examined the facts, and from the impressions derived from them he threw up his commission and wrote an independent history. But it is said that this is a case of assault and battery, and that history is not evidence. There is no magic in assault and battery that should take it out of the common rule. When the subject matter of the charge arises from history, then history is the best evidence. For ancient facts, history has been uniformly received. How can they be authenticated but by history? You cannot come at them by living witnesses; you can only learn them from the records of history. Transactions from a foreign country can only be learned from it. Plowden's History gives a detail of the facts that took place within its period; it speaks of the body to which this sect belonged, and is the best means of proving their conduct, Plowden has been arraigned

before the English reviewers, who do not know the facts he states; they are anxious to shake off the odium that was thrown upon their country by the details of truth. The history of Ireland was never known by them. The Edinburgh Review has much of good and bad in it. It is a weathercock test. We wish to read a public document from Plowden's History; it is inserted there, in confirmation of the facts stated by him.

Mr. Van Wyck. I rise to protect the court, as well as the counsel. If we are to begin with Plowden and the Edinburgh Review, we shall not get through this case in a month. This is a case of assault and battery. What has history to do with it? In this stage of the case I apprehend they have no right to travel through Plowden's or any other history; no ground has yet been laid for such a course of proceeding.

The COURT. There is no doubt history may be read in certain cases.

Mr. Graham. The counsel proposes to read Lord Gosford's address to the grand jury. It is not history. The counsel can only do it on the ground that he can prove it to be true, by legal evidence. This, however, is an extract.

Mr. Sampson. I have a right to read and print my speech, too, and have not I right to take part of it from Plowden's History, or any other history I think proper?

The COURT. We think it improper, at this stage of the case, to read history. It may be, and often is, read in evidence (the court gave an example). If a quarrel ensued in the East Indies between Englishmen and Americans, on the 4th of July, occasioned by the celebration of that day, it would be no doubt the right of Americans to read the Declaration of American Independence upon the trial, to show the object of the festival.

Mr. Sampson. I do not wonder that they should oppose reading history; but truth is mighty and will prevail. I shall trouble the jury no further. I shall call the witnesses; they will state to you the facts.

THE WITNESSES FOR THE PROSECUTION.

James Murney. Reside in Greenwich; am a weaver. Was assaulted on the 12th July by the defendants.

Mr. Sampson. Did you see an Orange procession that day?

Mr. Graham. As it would be improper to go into the occurrences of the whole day, they should be confined to the assault and battery.

The COURT. They had better

go on and confine themselves as much as possible to the assault and battery.

Murney. Went with Cassidy to the Orange party, who were carrying a flag. They were John Moore, Henry Bush, Mullen, and Lowry. Asked Moore if that was the Orange colors he was carrying. Moore took hold of the pole with both his hands and struck me. Was struck by the four defendants; felt the blows

for several days; was in danger of life. The pole was from 8 to 12 feet long, and from 3 to 4 inches square. I had no weapon. Had a debate; that is, defended myself. The Orangemen were armed; one of them had a carpenter's hammer. Made no attempt to strike until I was struck. There were between 12 and 20 Orangemen. Their headquarters were at Green's, McDonald's, McKeever's, and Burges'. Was very much astonished and frightened at seeing the Orange flag. They marched along and cried out, "Come forward, you damned croppies!" They meant Republicans. Told them they had better go to the British consul, and he would send them home. Had been forced to leave my country

on account of Orangemen. Went to the police when I saw it; could not make them understand it. They called out for croppies and papists. Croppy is a person not belonging to the Orange party—one who does not join their society. They paraded in the morning about 5 o'clock, and I heard guns. When they knocked me down I saved my life by saying, "Don't strike me; I am one of your side." Said so to make my escape. It was about 6 in the afternoon when I was struck. All the defendants took part in the aggression. Am a Catholic. They called me papist, and I said they did not know what I professed. Think they were in earnest. Cautioned them to leave off, and they appeared to be angry.

Mr. Graham A prosecutor cannot give in evidence the motives of the defendants, unless it is to show the assault and battery; they cannot come in aggravation, unless we go into mitigatory circumstances. We are not prepared to reply to these extraneous matters.

Mr. Emmett. The trial is the time for showing the intent of the party; it ought not to be left until after the trial to be shown by affidavits.

The COURT. When the party pleads guilty, the motive then comes up by affidavit; but where there is a trial, that is the proper time to show the intent of the parties.

Murney. After I returned from the police, the Orangemen hauled up their colors as in defiance; they seemed to be more bold when they saw we could get no law. They called out for M'Evoy's men, and said they would massacre them; defendants were part of them, but there were many others participating. I worked for M'Evoy. M'Evoy is a weaver, and keeps a manufacturing shop and employs men.

Cross-examined. Was in bed at M'Evoy's and was awakened by the guns, between 4 and 6.

Was very much frightened, and was afraid of being murdered. Would not have been frightened had it not been on the 12th of July. If Orangemen are not stopped in America, America will have cause to dread the consequences. Told others I was afraid of my life. Cannot tell the precise time I went to work. Think it was between 6 and 8 o'clock. None in the shop but were aware of the guns. When I went to the police I thought the law would protect me, but it was not there; had justice, but could

not make the law understand it. M'Evoy's men had looms where they wrought. All heard the guns that were awake. Talked at breakfast about it. Morris said he saw guns at Brady's and Waugh's. Saw the Orange flag for the first time, between 9 and 10 o'clock, before Green's door. It remained there. Nobody was then hurt. They stood around it in procession, and hurrahed for King George. Mr. Fagan came out with his naturalization paper, and said he had sworn against all monarchs, particularly against George III and IV. The principal reason why I was afraid and went to the police was that I never knew an Orange procession but blood was spilled. I offered to swear at the police to their proceedings. The officers could not understand the danger of the Catholics. They threatened to tear the the popish liver out of them.

Mr. Van Wyck. Suppose a man was on Washington Hall^a and should hurrah for King George, would another person have the right to pull him down?

Mr. Emmett. The cases are not parallel. The witness states he was afraid of his life.

The COURT. The question is not admissible.

Did not tell Cassidy to take down the pole. It was on the other side of the street from the shop. Did not go there until Cassidy went and got struck. Knew it was the celebration of the battle of the Boyne. Went to see the procession, and did not expect to be hurt. Heard Cassidy speak. Went to inquire if

it was an Orange procession. Never heard of an Orange flag in this country. Was two or three rods from Cassidy when he went forward. Heard them say they would tear his liver out when he made his escape. There was a great many spectators by. Cannot tell how many Catholics. Five or six of them were struck. The axe handle was taken out of the hands of Thomas Fitzgerald by Mr. O'Neil. Mr. O'Neil is a Catholic, and was pulling weapons from those who were doing mischief. The flag fell, or was torn off the pole which Moore had. Cannot say that one of the Catholic party struck a single blow. Made all the debate I could to save my life. Peter Fitzsimmons was left for dead on the ground when the fight ended. Never had any dispute before with those men. Went out to see the procession as I would the 4th of July. Went to Morris' house; Moore and others were there. They had the flag. M'Evoy went in and asked for pen, ink, and paper, to know their names before night, before there should be any danger. Had seen Moore and others go in there before M'Evoy asked me to go in and drink. Our party were standing in M'Evoy's own yard when Cassidy went forward to see the flag. Cassidy went up and asked if the shawl was an Orange flag. Cassidy was afraid of the Orange flag. They mounted a new flag in the afternoon. Cannot tell what became of the first flag.

Bernard O'Neil. Live in Greenwich; came with Murney to the police; heard of the

^aThe American Flag was then flying there in honor of the visit of LaFayette to the city.

Orange business at 9 o'clock in the forenoon. Saw between 11 and 12 o'clock, before we went to the police, a pole with orange lilies upon it. Saw a purple flag. Apprehended some difficulty might arise, and that occasioned us to go to the police. Heard they were in procession, and heard a fife. Saw the yellow flag at Mr. Keever's, about five minutes. Saw Cassidy go to them, and the first thing I saw was Moore striking Cassidy, and Cassidy finally got the pole out of his possession. Did not see Murney struck. Saw the Orange party have bludgeons. Took a bludgeon from a man in the affray. Got the axe helve from a woman who was striking a person with it.

To Mr. Graham. Am a weaver in my own employ; live in Ham-

mond Street, and am a Catholic. Henry Drake first told me of the procession, and Fagan advised me to go to the police. Cassidy went with me to see the flag, and to the police. Think Cassidy is a Catholic. Four went to the police, and when they came back the lilies were down, and they separated. Afterward heard a number of people say they were going to see the Orange procession; they were going to M'Ev-ers', to Green's, and when about half way they cried out, "Here we are, damn you; come on if you dare!" Cassidy then went forward, and was struck by Moore. The purple flag is a badge of their order. Have too good reason to know it. Have seen their certificate, called "Purple marks-man."

Mr. Sampson proposed to show the character and conduct of the Orange societies.

Mr. Graham objected to the inquiry whether they were peaceable societies, as it would violate a well-known rule of law, that consequences are not the best test of principles. The Catholic would not put the Catholic in the wrong, and he could call an hundred Orangemen to prove themselves peaceable.

Mr. Emmett, in reply to Mr. Graham's assertion that they were peaceable societies, spoke with warmth of the expulsion of 700 innocent and unoffending inhabitants, and proposed to refer to the Irish history to prove their character.

Mr. Graham contended that they could not go into the Irish history to show the conduct of the Orange societies; that it would be the means of destroying their character by mere report; that they were calculated to disturb the peace must be proved by other evidence.

Cicily M'Evoy. Saw the affray. They called M'Evoy's men papists; the affray happened at our house. Bush called out his men to fight. Hugh M'Evoy heard firing, and said, "My God, it is the 12th." Our men went to work. M'Evoy's cousin came to his house to get something to

drink. Moore came and asked M'Evoy if he wanted his name. The first thing was Cassidy and Daniel M'Evoy knocked down. Did not see William Lowry here during the day, but did not see them strike Murney. Was knocked down and senseless by the injury received.

Peter Fitzsimmons. Saw the first of the affray. Walked from where I lived, next door to M'Keever's, with John Cassidy and Murney. Cassidy went to ask about the colors. Saw John Moore strike Cassidy over the neck or head with the pole. Cassidy drew back. Daniel M'Evoy

caught hold of the pole and held it some time. The fight then began. Cannot tell who struck, and who did not. Saw Murney struck, but cannot say who did it. Do not think Murney struck anybody. Murney was bloody. The cut was on his head.

THE TESTIMONY FOR THE PRISONERS.

David Waugh. Was down town all the forenoon, till about 4 o'clock in the afternoon. I and three of the defendants went into Morris' to get drink. When they were there, three or four persons came. Moore had a pole with a flag on it. M'Evoy had a piece of paper. Three or four men came in with him. M'Evoy asked for a pen and ink. Moore, Mullen and Lowry went to M'Keever's with the colors; I and Irving went to Green's. The next thing was Moore and his party coming peaceably from M'Keever's to Green's. Saw 10 or 12 men coming towards them; they ran up to them. Saw Moore knocked down. Several gathered around and saw them fighting in the crowd, the others were knocked down towards the last of the affray. Saw Mullen and Moore knocked down before a word was said. Saw a green flag in the upper window of Moore's house, opposite Green's. Saw Moore's and the green flag at the same time. Can't say whether the green flag was up when the affray was going on; did not see it taken down.

Cross-examined. Moore was standing by my door when I came from down town. Am an Orangeman. There is such an

order in that body as Purple Marksmen.

Mr. Graham. You are an Orangeman? I am. What is the oath of that society?

Mr. Sampson objected to going into the inquiry.

The COURT. You cannot go into inquiry as to the nature of this association abroad. We will allow the simple questions. Was this society created for the purpose of a breach of the peace? Does it tend to a breach of the peace?

Waugh. Have sat in Orange lodges in Ireland six months. The society was not instituted, nor does it tend to a breach of the peace. There are no Orange lodges in this city, never heard of one in the United States.

Mr. Graham. Are the Orange processions calculated to break the peace in Ireland?

Mr. Emmett. I object to that question.

The COURT. It would be easy for an American jury to try the simple fact of assault and battery. It has, however, come out in the course of the trial that this was an affray between two sections of Irishmen. We think the inquiry is improper. The question can only be put as to the

tendency this society may have here.

Sarah Morris. Am the wife of Mr. Morris. Live in the village of Greenwich, corner of Amity Street and the Sixth Avenue. Our yard adjoins Green's. Saw the quarreling commence on the Orange side, about 5 or 6 in the morning. Heard Ralph Irving early in the morning playing "Patrick's Day" and "Boyne Water" on his fife. Saw Mr. Brady's little boy fire a gun off the stoop. He frequently does so. Six or eight Orangemen were celebrating the day. They offered no rudeness to anybody. Mr. M'Girn's family cried out, "Here comes John Bull till we pick the lick of him." The green flag was out of a window in our house. The Catholics said to the Orangemen, in reference to the flag, "There is your master; touch that, damn you, if you dare." Saw a bunch of lilies hanging on a pole on the other side of the street. A Scotchman named Miller said he could not bear to hear his shopmates (the Orangemen) so abused. Saw several who said they were from M'Evoy's come running with sticks longer than canes, and resembling axe handles. Saw that there was a riot at our house. The Catholics went to Green's and saw the yellow flags. Saw the affray in the afternoon. Irving, Robert Moore and Bush were hurt in the affray.

Cross-examined. Did not see the beginning of the affray. Saw stones go in the door. Lowry, one of the Orangemen, was much intoxicated. Don't know whether the Catholics had sticks. Did not know whether Murney said that morning "Here comes John Bull," etc.

Robert M'Keever. Am not an Orangeman; live at the corner of Fourth Street and Sixth Avenue. The affray happened on land belonging to Jones and Ludlow. On the morning of the 12th, about 8 o'clock, saw a green flag from Morris' house; heard a noise like scolding; stepped out to see what it was, and heard it was the 12th of July. Was sorry to see the green flag hung out. Requested to ask the people upstairs to take down the green flag. Went down town for two hours, and when I came back saw the green flag still flying. On the other side of the way was a pole with a ribbon and Orange lily tied on top. Next saw four or five men coming from M'Evoy's place towards Green's. Do not know whether they had clubs. Saw a handkerchief on a pole at Green's house, and Moore carried it. M'Evoy and two or three men went to Carmine Street, and thence to the Sixth Avenue towards Morris'. Moore and the others went into my house and asked for liquor, which I refused. Advised them to go home and leave off the celebration. They were going toward Green's, where they lived, when I saw 10 or 12 men come from M'Evoy's and meet them, and heard them say, "Now the flag goes down," upon which Moore was immediately knocked down. The Orangemen were three or four, and the Catholics 10 or 12 in number. Saw 20 men come from Cornelia Street in aid of the Catholics. Could not say whether any of them had bludgeons. There were not more than 10 Orangemen and about 30 Catholics.

Cross-examined. Saw clubs,

but don't know who brought them there.

Mr. Sampson showed witness the yellow handkerchief which had been used as the Orange flag, and asked him if he knew it.

M'Keever. It was my wife's. She gave it to one Young to go to a ball the evening before the 12th of July. The flag was not hung out of our window. My wife did not know when she gave it that it was intended to be used as an Orange flag. Saw the

Orange ribbons stuck up after the green flag was hoisted out of Morris' window. They were up about 6 o'clock in the morning. First saw the Orange lily between 9 and 10 o'clock. Saw the green flag at 8 o'clock.

To the COURT. Saw them (the Orangemen) strike nobody till they were knocked down. Did not see them strike anybody at all. Do not know of stones being thrown.

THE PROSECUTION IN REBUTTAL.

Thomas Munroe. Live at M'Evoys. Saw the affray begin. Saw them at Brady's house. They marched with colors, playing the fife, and with lilies. Affray begun between 7 and 8 o'clock. John Moore struck first. Cassidy went to see what kind of colors were there, and Moore struck him in the belly. Did not hear Cassidy say anything. One of our men went to relieve Cassidy. Bush struck Murney, and Moore struck me. They came with clubs out of Green's house. There were 15 or 20 Orangemen. When that affray began they rushed out. Bush had a hammer. None of M'Evoys' men had clubs. None of our side went for clubs; never lifted a stick. Only four Catholics and a great crowd of Orangemen. Was struck with a pole. None of the others present when Bush struck Murney.

Cross-examined. Am an Irishman and a Catholic. Never talked with anybody about it. Think Cassidy went to see what colors they had; heard him say so. Two guns fired at Brady's, but can't tell who fired them. Some said it was Brady's boy. Did not see

a green flag, and was close to the house. Wove 8 or 10 yards that day. None of the Catholics took up sticks. Saw them all come out of Green's house, and knew them to be Orangemen. M'Evoys was wringing his yarn in the dye-house.

James Morgan. Heard of the Orange flag, and had a curiosity to see it. Moore struck first with the pole. Had no concern in the affray. They boxed with fists. Orangemen went to Green's, and came out with billets of wood and fought desperately. Saw none of them strike Murney.

Cross-examined. Am a Catholic. Had not been at M'Evoys' nor Morris'. Did not hear Moore say, "Come on and take it (the flag) if you dare. Can't say who carried the axe handle.

James Cassidy. Never worked for M'Evoys. Was struck by the Orange party on the 12th July. Saw the Orange party opposite Morris', and went to see what it was. Told them they ought to take down the flag. John Moore struck, but did not injure me much. Did not see Murney struck by anybody at that affray.

Orange party fought a few minutes and then went into the gateway. Saw billets of wood with Orange party. No more blows after Fitzsimmons was struck down.

Cross-examined. Am a Catholic. First saw the colors opposite. Did not say aloud I would go and see what the colors were. Thought it was not particular to have a flying that day. Do not know whether they were in earnest. Thought it would pass without disturbance. Do not like to hear of their walking in a free country. Did not talk with Murney before he told them to take down the flag. Did not see Moore knocked down. Struck him, before he got the pole, with my fist. Did not see any person strike Murney.

Phelix M'Kinney. Saw part of the affray. Had come around from his house, and saw M'Evoy come around to rescue his wife, and was struck by Moore. John Moore said after knocking M'Evoy down, "Damn their souls, kill them all." Did not see M'Evoy knocked down. Do not know who knocked Fitzsimmons down. Did not see Murney struck. Mrs. M'Evoy had got a blow. Did strike and was struck, but am too old to fight.

Charles Gafney. Saw Moore and others who carried the

Orange flag. Moore was the first person struck. John Mullen struck Fitzsimmons with a billet of wood on the head. Did not see Murney struck. Saw M'Evoy come in a gore of blood. Catholics had no sticks; all the unmerciful weapons were carried by the Orange party. Heard them cry out for the damned papists to clear the way.

Cross-examined. Had no interest in either side of the affray. Saw the green flag up. Had no hand in putting it up.

Hugh M'Evoy. Am a weaver and a Catholic. Charged my men not to mingle with the Orangemen. No combination among the Catholics. Saw Moore strike Murney with his fist. Did not strike Murney with a pole. Saw no sticks with Catholics. Did not see what took place before Murney was struck. Do not know whether Moore or Murney struck first; they were all in a scuffle.

Cross-examined. Did not see a green flag. Went to the city hall. Never said I had a written order to take the names of the Orangemen.

James Murney (recalled.) Had nothing to do with the green flag. Had no arms but a split stick I picked up from one who had lost it. Have no combination among the Catholics.

THE DEFENSE AGAIN.

David Huston. Saw the affray. A party of Catholics, 14 or 15, came from Cornelia Street. They marched between M'Ever's and Green's house. They met Orangemen, and were not very peaceable. They went to Moore and his men. They halloed out, "It

is time to have done with your Orange work," and the flag came down. Saw no bludgeons or sticks. Murney was not struck. Saw neither side have sticks. Found sticks on the battle ground after the affray was over.

Mrs. Brady. Saw part of the

affray. Saw Robert Moore's child covered with blood, and Mr. Bush with lumps on his face.

William Robb. Was standing talking with a young man in Herring Street. Saw 10 or 13 men run from M'Evoy's. Run towards the flag. Cassidy took both hands to strike me.

Cross-examined. Am a Purple Marksman.

Jane Carson. Saw Mrs. M'

Evoy throw a stone or brick-bat at Mr. Irving.

Cassidy (recalled.) I went to make peace. Would have struck if I had not come to make peace.

Robb (recalled.) Cassidy did not say he was a peacemaker. Did not act like a peacemaker.

Mr. Graham offered to prove by six witnesses of unexceptionable character the Orange oath.

Objected to by *Mr. Emmett* and overruled by the COURT.

THE CHARGE OF THE COURT.

RIKER, RECORDER. Gentlemen of the jury: The defendants stand indicted for an assault and battery committed on James Murney, on the 12th of July last. This is a simple case of assault and battery upon the record, and we might have decided it in two hours, but have been influenced by zeal and passion, and have been carried away by extraneous matters. I shall first notice the law, as contended for by the counsel for the defendants.

First—The jury are judges of the law and fact. This principle of criminal jurisprudence has been so long and so firmly settled, that it is too late now to intrench upon it. No enlightened court would intrench upon that province of the jury. In any direction of the court, as to principles of law, you have a right to differ with them, and it may be your duty, gentlemen, in some cases to differ with them. A decent respect to their direction is only expected.

Second—When an affray is about taking place, and a man intermingles in it, becomes a party to the affray, and must take the consequences—he must give notice of his peaceable intention—that his object is to suppress the affray, or he will not be justified.*

Third—By our constitution and laws, all associations have a right to meet and celebrate their festivals, taking care not

* 1 East. 304.

to violate the laws. The United Irishmen, the French, the Spaniard, and the English, have a right to meet and celebrate as they please; the authority of the country will not interfere (even where there is error, for error may be tolerated, as long as there is reason to conquer it), if they do not violate the peace.

Fourth—No words will justify an assault. If they called for croppies, etc., it would not justify the violence that ensued.

Fifth—If the defendants struck in self-defense, they are not guilty. But to this rule there is an exception: for example—if two men go out to fight, and do fight, it is an assault and battery in each.

The Court has now remarked upon the principles of law, as applicable to the case. Did the defendants assault James Murney or not? Were the blows given as testified by him? Where two go out to box, and commit a breach of the peace, they are both guilty. The agreement to do wrong can be no justification to them.

If a man sees an affray, or a collection of people about to commit an affray, and looks on without attempting to prevent it, the law, which pays no respect to persons, deems him in some measure guilty, and will punish him as a party in the affray. What is it, gentlemen, that keeps the American people together, but their constitution and laws? No man dare trample upon your privileges. Dare any man assault your wife and children? What protects them but the law; and shall that law be violated with impunity? I do conjure you, gentlemen, as you value the sacred rights of an American citizen, as you hold in reverence the sacred office of jurors, that you put a stop by your verdict, to such open violations of the hospitality and laws of the American people. By the constitution and laws of the United States every man has an undoubted right to worship God according to the dictates of his own conscience. The laws can never permit that sacred right to be violated, and will punish every attempt to intrench upon it. Gentlemen, I do conjure you to dismiss

every feeling of prejudice, be it religious or political. Decide this case upon the principles of public policy and law.

What would be the consequence, gentlemen, if these public violations of the peace were tolerated? The government would end in anarchy and in blood. The equality and liberty of our laws are known throughout the world. This happy country is an asylum to the oppressed of every nation on the face of the earth—here they find security and protection. What do we ask of them in return? Do we ask them to change their religious opinions—to renounce their political creed—to abandon the forms and ceremonies of their former life? No. All we ask in return for all the privileges they enjoy, is that they will be good and peaceable citizens, and obey the laws. What then must the Court and jury think of those people who violate the hospitality and laws of that country that has offered them an asylum and afforded them security? Although, gentlemen, we believe the defendants guilty of the assault and battery, yet we are compelled, in the most decided manner, to express our disapprobation of the conduct of the other party. We know nothing about Orangemen, Catholics, United Irishmen, etc. They are all protected, and entitled to protection, by the laws of this country. We know there has been a mob, and a most shameful violation of the laws of the land in New York, in Pater-son and in Lockport. It is for you, gentlemen, to put down these illegal associations—to put a speedy and effectual stop to these violations of the peace.

THE VERDICT.

The *jury* retired about 9 p. m., and returned at half past 10 with a verdict of *Guilty*.

THE TRIAL OF HUGH McEVOY AND OTHERS FOR ASSAULT AND BATTERY, NEW YORK CITY, 1824.

THE NARRATIVE.

A month after the conviction of the four Orangemen for the riot on the 12th of July (see *ante*, p. 189) five of the Catholics—including one woman—were brought to trial. The evidence was pretty clear that it was six of one and half a dozen of the other; that both parties were spoiling for a fight that morning. The lawyers for the defense had not gone very far into their evidence before the judge suggested that it was hardly worth while to waste the time of the Court as it was not possible to escape conviction. The lawyers agreed with him and next day the nine being brought before him, the judge read them a lecture. He pointed out the folly of their trying to bring over here the dangerous and unbecoming practices which had caused so much disorder and misery in the unhappy country they came from. In the United States every religion was equal and every one had a right to believe what he chose—religious persecution was not tolerated. It did the Orangemen no good to perpetuate the bitter feuds of the past, nor the Catholics to break the peace by acts in revenge for the defeats of a century ago. He would not send them to jail or fine them but he would bind them all with sureties to keep the peace for the period of one year.

THE TRIAL.¹

In the Court of General Sessions, New York City, October, 1824.

HON. RICHARD RIKER,² *Recorder.*

October 13.

The prisoners, Hugh M'Evoy, Cicely M'Evoy, James Cas-

¹ Wheeler's Criminal Cases. See 1 Am. St. Tr. 108.

² See *ante*, p. 189.

sidy, David M'Williams and Timothy Leary, were indicted for an assault and battery on Henry Bush in New York City on July 12, 1824. They pleaded *not guilty*.

Hugh Maxwell,³ District Attorney; *David Graham*⁴ and *Pierre C. Van Wyck*⁵ for the People.

Thomas A. Emmett,⁶ *Robert Bogardus*,⁷ *William Sampson*⁸ and *John Fay*⁹ for the Prisoners.

MR. GRAHAM'S OPENING.

Mr. Graham. Gentlemen of the Jury: The defendants are indicted for an assault and battery on H. Bush on the 12th of July last, during a procession of Orangemen in the village of Greenwich, having this peculiarity, that it is one of the remote consequences of a very ancient feud, bottomed on passions of the most desolating character, partly political, but religious in a much greater proportion. The contending parties have at different periods assumed different names, and have been actuated by passions varying in strength, but the nature of the quarrel has been essentially the same. Like the waters of the Nile, you can trace their animosities back over vast and desert regions, sometimes descending in a widely spreading and majestic stream, sometimes dashing from precipices of tremendous height, foaming with awful grandeur in the gulf below; at others dragging itself along through the sluggish mud, and anon gentle, contracted, and diminishing, ending in a diminutive stream of two feet in diameter. In Ireland, the birthplace of their quarrels, they were originally designated English and Irish, afterwards Protestants and Catholics, and finally Orangemen and Ribbonmen. This last, being the character in which the parties appear before you, requires some explanation.

³ See 1 Am. St. Tr. 62.

⁴ See *ante*, p. 190.

⁵ See 10 Am. St. Tr. 567.

⁶ See 1 Am. St. Tr. 63.

⁷ See 1 Am. St. Tr. 718.

⁸ See 1 Am. St. Tr. 63.

⁹ See 1 Am. St. Tr. 718.

The distinction of Catholic and Protestant prevailed from the Reformation until 1793, when Wolfe Tone planned a society on principles analagous to those of the French Revolution. It was called "The Society of United Irishmen," and it was composed chiefly, but not exclusively, of Catholics, all parties forgetting their distinctions in the ferment of political enthusiasm, which did what nothing else could have accomplished, uniting those who had for more than six centuries been tutored and trained to hate and extirpate each other. The professed object was "a general amelioration of the Irish people by a reform of Parliament, and an equalization of Catholic and Protestant interests;" but Parliamentary change, and Catholic emancipation were only pretexts, the main object being to accomplish a revolution. When the Protestants had time to cool and reflect, and the fervor of the French Revolution had quenched its rage in the blood of its own votaries, they saw their error, and were shocked at the idea they had in a moment of frenzy entertained, of casting off the protection of the British government. They suddenly repented, and with an impulse which usually follows political enthusiasm, they vibrated into the opposite extreme. To restore public confidence, and to secure themselves more effectually from the Catholics, they superadded to the oath of allegiance one of loyalty and renewed attachment to the government. And because the Protestant ascendancy was first achieved by William, Prince of Orange, they chose him as their patron saint, and renewed the celebration of the victory over James. The former derived the name of Orangemen from the Prince of Orange and emblems of that color, the latter being distinguished as Ribbonmen, owing to a green ribbon, the badge of the order of the United Irishmen. The great political union being thus broken, the Catholics cohered with more inflexible attachment to each other, and condensing their energies, directed them to their emancipation from penal laws, and restoration to equal rights. With these motives and objects, and distinguished by their respective emblems, the Ribbonman has celebrated his Patrick's day

on the 17th of March, and the Orangeman his King William's day on the 12th of July. In later years, these celebrations have been attended in Ireland with frightful breaches of the peace. The parties, armed and unarmed, have, in imposing numbers, arrayed themselves against each other, and prompted by the most infuriated passions, aided by traditional animosities, have steeped the adverse emblems in blood. Whether these associations are legal in themselves, or become illegal only in their consequences, may be a question, but is one of little moment. It is sufficiently manifest they cannot be endured. In Ireland they have been discountenanced, whether voluntarily as some, or by statute as others pretend, is immaterial.

Gentlemen, those wild and crude transactions were formerly matter of history, or at the most, of information carried across the Atlantic from the troubled and bloody scene of action; but they have, in an evil hour, with all the secrecy, malignancy, and wide-spreading mischief of a pestilence, found their way to the peaceful bosom of society here. On this subject an experiment has been made in the neighborhood of our city last July, into the nature and effects of which one jury has inquired and passed as against the Orange party; and it is reserved for you, in the administration of even-handed justice, to inquire into and pass upon the demerits of the adverse party. It will appear that, early on the 12th, the Ribbonmen hung out a green flag in view of a few Orangemen at work in the shop of one Green; that much abuse accompanied and followed the insult; that the party at Green's subsequently erected a pole and crowned it with an Orange wreath; that shortly thereafter a party of Catholics came round, armed with clubs, and challenged the Orangemen out to fight; that this being declined, they prepared themselves for a battle towards the evening, and actually fell upon two or three Orangemen, of which the complainant was one, in great numbers, and armed with bludgeons, which they used to the great terror of the neighborhood, and the almost entire destruction of their adversaries.

THE WITNESSES FOR THE PROSECUTION.

Henry Bush. On the 12th July last a party of Catholics were assembled at the house of Morris, in Greenwich. They commenced with great abuse towards the Orangemen. About 8 or 9 saw a green flag out of Morris' window. Saw James Murney there. He, in particular, was very abusive. In the afternoon Moore, Mullen, and Lowry had an Orange handkerchief on a pole. Came to Morris' with it. Went from Morris' to M'Keevers' and then went towards their boardinghouse. Then saw 10 or 14 men come from M'Evoys' yard towards the Orangemen. The Catholics, aided by about 14 more, attacked the Orangemen, and when I ran up to save Moore from being murdered, I was knocked down by Cassidy and

beaten by all the defendants. Mrs. M'Evoys' struck me after I was down. I was much hurt. Did not take part until the Orangemen cried "Murder," after they had been attacked by the Catholic party. Mrs. M'Evoys' had a club and threw stones.

Cross-examined. Was not stripped to fight. Struck somebody on the head when they were all coming up with bludgeons, but do not recollect who it was; defended myself all I could. Mrs. M'Evoys' struck me with a club. Do not recollect that I struck Hugh M'Evoys'. M'Evoys' struck with a pole; M'Williams struck with a stick. I and Ralph Irving did not go to Morris' together. I went to ask the Orangemen to come home.

The COURT. Gentlemen, had you not better confine yourselves to the circumstances immediately connected with the affray?

Mr. Sampson. We introduce these circumstances to show that the Orange party was engaged in an unlawful act. Nobody has a right to wear the star-spangled banner, and go about challenging persons out to fight. Catholics are to be protected.

The COURT. Protestants and Papists stand among us on the same footing.

Mr. Sampson. Not if Protestants call out for Papists to murder them.

Mr. Fay. We wish to show that it was an insulting epithet that the prosecutor used towards the Catholic party; and if he induced an injury to himself, he cannot now turn round upon the party—he must take the consequences.

Mr. Graham. The counsel assumes that the prosecutor called them Papists, and that he was of a party. He expressly stated, they were called Papists, not that he called them so; denied that he was of a party, and says that he did not come up until "murder" was cried.

The COURT. We are of opinion, that in this case the prosecutor is not the party seeking redress—that he merely appears to testify on the part of the people. The question here is, has a breach of the peace been committed, and if so, did the defendants commit it? We think, however, if we understood the witness rightly, he said not that

he called the Catholic party Papists, but that they were called so by way of description.

Bush. Saw McEvoy about an hour before the affray at Morris'. Saw M'Evoy go back and forward frequently, and his men go upstairs. The Catholics were at Morris', the Protestants at Green's.

The COURT. All about Protestants and Catholics had better not be said, as it cannot weigh a feather. We are sworn simply to try the fact of assault and battery.

Mr. Sampson. It becomes important to ascertain whether the witness correctly states what took place, otherwise the defendants must be convicted by a terrible falsehood.

Mr. Graham. We are under the direction of the Court. From the course pursued in the other trial, I had anticipated similar proceedings in this. I agree with the Court that these were simple trespasses, and as such ought to have been regarded throughout. But having commenced with party distinctions, and our clients presented to another jury in the unpopular character of Orangemen, I thought it but right the distinction should be kept up on this trial, and they should have the benefit of it in their turn. We are contented, however, that the Court should control the testimony, relying on their impartiality in distributing the judgments.

Mr. Sampson. I did not put them before the last jury as Orangemen. I put them simply as persons who had broken the public peace, and as such they were convicted. Fault, my clients have none, unless that they are papists, and cling faithfully to their religion. I give them credit for it. We can show that they were peaceable, and that the first attack was made on them by the party complaining now. I hope the corporation, alive to the interests of this unfortunate class of this community, will step forward in their defense, and protect them from such gross and unprovoked attacks as this in future. Evil epithets have been used, in order to prejudice this jury and obtain a conviction; but such, I know, will be disregarded by the jury.

Mr. Graham. I have used no harsh epithets. I have opened the case broadly, anticipating the same extent of investigation in this as the other trial, and leaving it to the Court to limit the inquiries in their discretion. I regret the gentleman will indulge himself in personalities, and cannot help thinking these difficulties, speeches and animadversions intended to furnish materials to certain penmen, who have come here not so much to report a trial as to exhaust their malice against the advocate.

The COURT. This is a plain question of assault and battery. If the defendants are guilty, they must be convicted; if not, acquitted.

Bush. Thomas Monroe, one of M'Evoy's men, went upstairs at Morris'; saw a great many more, whose names have escaped my memory. Picked up a stick when I saw them come; did not strike till I was struck, and only defended my-

self; as I was retreating, they flung stones after me. Leary struck me with some sort of club. All those who came to attack the Orangemen had clubs. Neither Moore, Mullin nor Lowry had sticks. There were sticks of split wood in Green's yard. There was no combination among the Orangemen.

Mr. Sampson. Are you an Orangeman? I am, and a Purple Marksman too, and I will tell you what they are—there is a wrong impression about them.

The Court. We must confine ourselves exclusively to the fact of assault and battery.

John Moore. Mullen and Lowry and I were coming from M'Keever's with a flag, and crossed an open lot going to Green's where they boarded. Were about thirty yards from Green's when 12 or 14 men came out of M'Evo's yard, and when they were coming up said, "Now the flag goes down." Cassidy struck Bush with a stick. Bush gave no cause. Saw all the de-

fendants mingling in the affray and strike, but cannot say whom they struck. Mrs. M'Evo's threw stones. There were only three of the Orange party when the Catholics attacked them. Bush and Irving came to the aid of the Orangemen. They did not strike before Cassidy struck Bush.

Cross-examined. Had no stick; carried the flag. No agreement with Bush and Irving to come up; Cassidy and Murney ran up and said, "Now the flag goes down!" I swept with the pole as they were coming up. Cassidy got the pole away from me; did not take the flag to insult anybody. When I, Mullen and Lowry were at M'Keever's, M'Keever told us to quit and go home. They were on their way home when we were attacked. Bush works with witness at Green's. A crowd had collected before Bush and Irving came up; was knocked down and laid on with clubs; was much hurt; am not quite 18 years old, and am not an Orangeman.

MR. SAMPSON FOR THE PRISONERS.

Mr. Sampson commenced by conjuring the jury not to allow any feeling of prejudice to weigh a feather with them on this trial. It is only an assault and battery on the record, but it is an important and a very important case to the defendants. In this case, involving, as one of the counsel has told you, the heads and protectors of many poor families, useful and industrious men, who were never engaged in any quarrel before, are charged with a combination to break the peace. If they are guilty, let the arm of the law fall heavy on their heads; but if this charge is untrue, and they are peaceable men, let them not be victims to those who have led them into the scrape.

Gentlemen, I shall show you that there was no combination—and it is a very injurious and wicked contrivance to say that the Catholic party rushed on by preconcert—that M'Evoy, who is termed the ring-leader of this affray, acted the part of a peaceable man, and remonstrated the whole of the day against such proceedings. He had given no provocation to anybody that day; but in pursuance of his peaceable motives he had gone to the police to get the magistrates to suppress this unlawful assemblage. After waiting all day in anxious hopes that this Orange celebration would end, these unfortunate persons went forward as good citizens, after the affray had commenced, to stop it. They were desirous of peace—they knew the consequences of these celebrations in their native country—and for doing what every good citizen not only ought, but is bound to do, they were desperately beaten and abused. M'Evoy, who is put forth as the head conspirator, got a desperate blow in the head. But it is said that they went there with clubs. We shall show that there is no truth in that assertion. They had no clubs, or if they had, they were picked up in the course of the affray from their antagonists. As to the green flag, the defendants had nothing to do with that. Some pedlars at Morris', seeing the work that was going on, commenced blackguarding with the men at Green's. Neither M'Evoy, nor any of his men, had anything to do, however, with the blackguarding match. Murney, it is true, was seen there, but it was to see a woman who lived there, and was in the habit of winding bobbins for him.

Gentlemen, this was a most dangerous quarrel for the Catholics; they all received some token of this Orange brotherly love. One man was left for dead on the field of battle, whose only offense was an attempt to rescue a woman, who was most brutally and shamefully beaten; and Cassidy, who went up in the most peaceable manner to see whether that was an Orange flag, was swept by the pole, as Moore has told you. The Catholic party did not run up to the Orangemen to the number of 12 or 14, as has been told you; they

were principally spectators, who had been attracted to the spot by the drunken ribaldry and abuse heaped by these Orangemen upon the unoffending Catholics. We shall show you that M'Evoyn did not strike any person in the affray, and that he did not interfere at all but to preserve the peace; that his wife, far gone in pregnancy, who is brought before you as a defendant, was most shockingly beaten and abused; and in order to satisfy you that the Catholic party had no sticks, and used none in the course of that affray, we shall further prove that the Orangemen had their bludgeons stacked up in Green's, ready for use at a moment's warning. If the Orange party came out with unholy intentions—if we can show you, as I think we can, that they came out with the intention to commence an affray, and attacked the other party, who had offered them no offense, the defendants must be acquitted.

Gentlemen, this was not a drunken quarrel, in which each party was equally in the wrong—it was an attack upon a parcel of injured and persecuted men. When they got up this insulting procession, they induced these unfortunate people to come up; and when they came up, they gave them a wip, or a stroke, for what every honest citizen ought to, attempting to put it down. I shall not follow the counsel who opened this case on the other side into history, or in talking about English pales. That was the commencement of Catholic sufferings. They came into the heart of their very country to wage a war of extermination. The reformation was made the instrument of the grossest pillage and most horrible murders and robberies ever heard.

Gentlemen, honest and more loyal citizens than these who lie under such gross imputations are not to be found in this community; and are you to be told that you are to be blinded with prejudices against them, and that they are to be sacrificed to the cunning and talents of those long practiced in such things.

When the evidence which we shall produce is laid before the Court and jury, I shall confidently ask for my clients a verdict of acquittal.

THE WITNESSES FOR THE PRISONERS.

Daniel M'Evoy. Hugh M'Evoy and I went into Morris' on the 12th of July last, and the Orange party were there. Hugh M'Evoy asked Morris for some ink, when Morris handed him a bottle. M'Evoy found no ink in it. Moore then came up and said, "Mr. M'Evoy, do you want my name?" M'Evoy replied, "I want nothing to do with you," and he and I went away; saw the affray. Moore, who had the flag, said, "D—n you, for Papists, come and take the flag if you dare!" Murney said to the Orangemen, "You had better go home and quit this Orange work, and if you are not able the British consul will send you home." I went to see if King William's picture was on the flag, as they have in Ireland. Moore began the affray by striking Cassidy with the pole. I never let the flag go till he tore it off. Did not see Bush strike. Don't think a man went but three from M'Evoy's. There was no concert among them to go, nor intention to fight. They went to see it as they would on the 4th of July. There were no clubs when the affray began. The Orange party went over towards Green's, and other men came from Green's. Saw stones thrown by David Waugh and John Black, and hit Hugh M'Evoy. There was no provocation, except the one party going to meet the other. None went out to fight to my knowledge. Many spectators were wounded.

Mr. Sampson. Did you hear guns fired that day?

Mr. Graham objected to the inquiry as entirely too general.

Mr. Fay. If they provoked the

affray, it does not lie in their mouth to take advantage of their own wrong.

The COURT. If two agree to break the peace, and do break it, both may be indicted and convicted.

M'Evoy. Did not know of any combination among the Orangemen, any farther than their actions showed. Mrs. M'Evoy came to rid me out of their hands. Heard her say she was hurt. Saw her throw stones after that.

Hamilton Harkness. Was informed of an affray going on between the Orangemen and Catholics. Went and saw Moore and Cassidy contesting about a pole with a yellow flag on the end of it. They fought some time; had no connection with M'Evoy's men; saw men passing backward and forward, but saw none run out; did not see M'Evoy strike; did not know Bush at all; did not see any come across the street with clubs; saw M'Evoy leave the place bloody.

The COURT. Did you see the defendants on the battle ground? Yes. Did you see any of them endeavoring to put an end to the affray? No. All who were in the affray appeared engaged.

James Morgan. Am a Catholic; don't work with M'Evoy; first saw Moore and another young man standing at Morris' corner. When Cassidy went forward and asked them to take down the flag, he was struck by Moore. Can't say how they all came there at once. Only three of M'Evoy's men were there; did not see colors until I went down and saw the flag at

M'Keever's. Neither party had clubs when the affray commenced. There were four or five men with Cassidy, and two or three with Moore; did not see Bush there; did not see M'Williams strike. All appeared engaged on each side. Could not say how many there were. They were pretty hearty at it. This was between 4 and 5 p. m.; did not see Leary strike anybody. There was a great number engaged. There were at least fourteen of the Catholic party on the battle ground. Cannot say how many of the Protestants

were there—were a great many engaged in the affray whom I did not know; saw the defendants on the battle ground.

The COURT. Did the defendants appear to try to put an end to the fight? I observed nobody trying to make peace; all appeared doing what they could.

Daniel Cassidy. Saw part of the affray; saw Moore coming from M'Keever's. James Cassidy came round by Cornelia street and walked towards Moore, and then Moore struck him.

The COURT. How will Morgan's testimony be got over by the defendants? He says that they continued to fight pretty hearty, and that the defendants were engaged in the affray; and it is a clear principle of law, that all who are engaged in an affray are guilty of a breach of the peace, unless they use their endeavors to stop it. Here no attempt to restore the peace is pretended, and did not exist, if Morgan is to be believed, and we think he is entitled to full credit.

Mr. Fay. We contend there was no agreement to fight, and that our clients struck back only in self defense.

Mr. Sampson. We have a right to show our witness is mistaken. We shall proceed to call witnesses to that fact.

The COURT. We can only repeat the principle of law governing this case. It is fully proved, unless you can show Morgan to be perjured, your clients, so far from trying to stop the affray, to use his expression, were "pretty hearty at it."

Mr. Sampson. I shall examine my witnesses, and defend my clients to the utmost.

The COURT. Gentlemen, it is not worth while to waste the time of the Court. If your witnesses, Morgan and Harkness spoke the truth, there is an end of the case. If, however, you insist on examining more witnesses, it is your right, and we

shall devote sufficient time to it. In the meantime, being late, we shall direct an adjournment.

October 12.

The RECORDER recommended the counsel for the defendants to submit their cases, as it was not possible they could escape conviction. The Court had resolved to punish neither party for the present, but only to recognize them to keep the peace for one year, and in the meantime, to suspend the judgment.

The *Counsel* agreed, upon which the jury pronounced a verdict of guilty, and his Honor directed both parties to appear on Saturday with their sureties, when they should be admonished, and their recognizances taken.

October 16.

The RECORDER said that on the former trial, he had laid down the law to be, that whatever provocation might have been given, it could not amount to justification, even if the first blow came from the opposite party; that no person could lawfully mingle in an affray, unless with a view to quell it; and that any person so interfering, was bound to give notice that his intention was to keep the peace. It appeared that the parties lived on opposite sides of the street, and that the battle took place on the side occupied by the Orangemen; it was, therefore, a presumption that the Catholics had crossed over with a view of encountering them. The case resembled that of two men going out to box by mutual agreement, both being guilty of a breach of the peace. Messrs. Emmett and Sampson, counsel for the Catholics, had agreed to submit to a verdict against them, leaving it to the wisdom and justice of the Court, to deal with them in the manner best adapted to the case, to prevent future disputes and fresh outrages.

I would represent to the Orange or Purple Marksmen, the folly of their attempting to introduce into this country those dangerous and unbecoming practices, which had caused so much disorder and misery in their own; I attributed it to the recency of their sojourn here. Happily for the United States, no such religious bigotry, and party feeling in matters of religion, here existed; the great and fundamental principle of

the constitution wisely ordained by the best of statesmen and most enlightened patriots, was that of entire freedom of conscience and universal toleration for every religion. It was for this reason that the teachers and professors of religion were, for the sake of religion itself, and the preservation of its most sacred interest, deprived of all temporal power. To worship God according to the dictates of men's consciences, was a right that no man, and no sect should dare to violate. All were bound to tolerate each other; and a great and wise philosopher has laid it down as a principle that "error can never be dangerous, where reason is left free to combat it." Mahometans, Gentoos, and pagans of every description, were to be as much tolerated in their religion, as Christians themselves, so long as they did not molest, persecute, or disturb others on the ground of their religion. Religious persecution was the deadliest scourge that had ever been inflicted upon man; and, wherever a religion arrogated the right of dictation, persecution was the natural consequence.

In this respect all religions were alike; even that of Christianity was not exempt. Cruel persecutions he feared existed in the afflicted country from whence they came, but that it should be transplanted to this land of freedom was subject of equal astonishment and regret, and could scarcely be believed did not history furnish so many melancholy proofs of this infirmity in human nature, which nothing but the best institutions and the light of reason and experience could subdue. His HONOR then proceeded to say that secular power was the mother of persecution; that the leading sects of Christians have all in their turns been persecutors. The Episcopalian, or High Church, it was well known, had persecuted, and popery laws and test acts against Protestant dissenters were established matters of history. The repeal of the edict of Nantes was an instance of Catholic bigotry and superstitious fanaticism, and the memory of Henry IV is cherished in history for the wisdom and benevolence with which he struggled to obviate and counteract its baneful effects. He might also instance the Catholic persecutions of Mary, and the pre-

sent unhappy state of Spain. He must candidly own, too, that the Presbyterian religion, to which he belonged, had not always been free from bigotry and persecution; for during the reign of Cromwell, such was the fanaticism of the Presbyterians in Parliament, that an act was passed inflicting fine and imprisonment for one year for the crime of having in the house, opening or using the Book of Common Prayer. But happily in this country religious persecution was in a great measure guarded against by those great and enlightened statesmen who laid the foundation of its political happiness. Washington was an Episcopalian, Franklin an Unitarian, and one of the ablest generals during the Revolution was a Quaker, and one of the most gallant and successful generals during the late war was the son of a Quaker. He again adverted to the Catholics; spoke of them as valuable accessions to the national strength, and ornaments to society; and lamented that they had suffered themselves to be provoked into acts which had led them into so much difficulty. M'Evoy was a respectable man, as indeed most of them appeared to be. For M'Evoy, he thought, there was some excuse, as he went into the affray to rescue his wife; but she was wrong in throwing a stone, notwithstanding her relation was in danger. With respect to both parties, the Court was for this time disposed to let their own reflection and good sense direct them to better conduct for the future. It would remind them of the trouble and vexation those broils had brought them into, and pointed out the advantage of forgetting all party feelings which had their origin in the country from whence they came, and drew a lively picture of their present disagreeable situation contrasted with that which they would experience if they would now, being settled in this country, bury all animosities and live in peace and harmony with each other. The Orangemen were at perfect liberty to commemorate any festivals of public events; but it must be done in a manner to give no offense to their neighbors, nor to disturb the public peace.

The celebration of the battle of the Boyne, and other events, however, could do the Orangemen no service; and tended only

to draw on them the derision of their neighbors. King William. it was true, had obtained a victory over the Catholics on that memorable occasion; but that was now past, and it was irrational for Irishmen to go back so far into antiquity for causes to perpetuate quarrels and bloody affrays with each other.

The sentence of the Court was in order to give both parties an opportunity of profiting by the admonition which the Court had now given them, that each, and all of them, who had been found guilty, should be bound in their own recognizances of two hundred dollars, with a security in one hundred dollars to keep the peace for one year, hoping that at the expiration of that time, the lenity of the sentence, and their own reflections would have the happy effect of healing the divisions and allaying those animosities which have been productive of so much wretchedness to unhappy Ireland.

The RECORDER, in the course of his remarks, adverted to certain misrepresentations which had gone abroad respecting some expressions of the counsel of the Orangemen, and stated, among other things, that the counsel had not said the Catholics were not worthy of toleration, but only that, as casuists, they did not approve of the Catholic creed.

**THE TRIAL OF THE ACTION OF DRED SCOTT
(A SLAVE) AGAINST IRENE EMERSON, FOR
FALSE IMPRISONMENT AND ASSAULT.
ST. LOUIS, MISSOURI, 1847.**

THE NARRATIVE.

Dred Scott* was a negro slave belonging to Dr. John Emerson, a surgeon in the United States Army. He was born in Virginia, the property of Peter Blow, who later removed to St. Louis, where he sold him to Dr. Emerson. In 1834 Dr. Emerson was ordered to Rock Island, a military post in

* The owner of this historic name was once a familiar figure on the streets of St. Louis. He was about 4 feet 9 inches in height, and had a dusky skin and a wooly head. His dress was careless, and there was a slight swagger to his walk common to most negroes of his day. In the year 1828, Peter Blow came to St. Louis from the State of Tennessee, bringing with him a large number of slaves. Among them was Dred Scott, a powerful, active young fellow in his twenties. Subsequently an army surgeon, named Emerson, who wanted a slave to accompany him to a new military post at Rock Island, Ill., arranged for the purchase of Scott. But Scott had taken a great dislike to Emerson, and when he heard that the sale had been consummated, he ran away. A "run-away nigger" in those days never tried to distance his pursuers but dodged around among the haunts of his fellow slaves as long as possible. In this manner Scott succeeded in avoiding the vigilantes for several days, but was finally found in the "Lucas Swamps" (now Twelfth and Pine Streets), a resort beyond the city limits, where the slaves used to meet and play cards. Scott was turned over to his new master and taken to Illinois, a free State. This was in the year 1834. Two years later Emerson moved to another military post known as Fort Snelling, on the west bank of the Mississippi River in the territory known as "Upper Louisiana" (now Minnesota), where slavery was not recognized. Here Dr. Emerson bought from Maj. Taliaferro a negro named Harriet, and she soon became the wife of Dred Scott, with the consent of Dr. Emerson. The issue of this marriage was two girls, named Eliza and Lizzie. Eliza was born on the steamboat Gypsy, on the Mississippi River, north of the north line of the State of Missouri,

Illinois, and later to Fort Snelling, then a part of Wisconsin Territory—another military post. Both places were on free soil. Dr. Emerson took Scott with him as his servant, and at Fort Snelling the slave was married to Harriet, another slave, whom the doctor had purchased from another army officer. Of this marriage there were two children: Eliza, born on a Mississippi steamboat, north of Missouri, and Lizzie, born at Jefferson Barracks, Mo. Dr. Emerson came back to St. Louis, bringing Scott and his family with him, and six years later died in Iowa, leaving all his property to his wife and daughter and appointing his widow and his brother-in-law John F. A. Sanford, his executors. For a time after this, Dred Scott seems to have been employed at army posts, but later he was returned to St. Louis. Mrs. Emerson did not relish ownership of slaves, and yet could do nothing, as the Scott family, with the other property was left to her in trust. Within a short time she removed to the East, and Scott, who was a shiftless negro, very soon, with his wife and daughters, be-

and Lizzie was born seven years after at Jefferson Barracks, Missouri. In 1838, Dr. Emerson came back to Missouri, bringing his slaves with him.

After the decision of the Supreme Court of the United States (*post*, p. 252), Dred lived a very short time. The anxiety and excitement inseparably connected with his suits made him prematurely old. His master ultimately gave him his freedom, but the decrepitude of old age rendered him unfit for hard work. He was supported largely by Theron Barnum, of Barnum's Hotel. To travelers stopping at the hotel he was an object of interest, and he reaped a golden harvest from their generosity. Had Dred Scott lived in an era of dime museums or moving pictures, he would have been wealthy, but he died poor in the year 1859. Henry T. Blow and others contributed money toward the funeral expenses. He was buried in the old Wesleyan Cemetery, on Grand Avenue. A fund was started by the negroes to erect a monument to his memory, but its originators failed in their project, and the bones of this famous colored man were lost when the cemetery was closed. Harriet, his wife, died a few years later, and not long after Eliza, the eldest child, followed her parents to the grave, at the age of 25. Eliza had no children, but Lizzie the youngest child, who married Henry Madison, had a family of seven. A large oil portrait of the old negro hangs in the Missouri Historical Society quarters in the Jefferson Memorial in Forest Park.

came a charge on the bounty of Taylor Blow,¹ a son of his old-time master and the playmate of his childhood in Virginia. This suggested a suit for his freedom which would relieve his patron from the burden which the slaveowners of the time recognized as a duty to the old slaves of the family. And, lawyers being consulted, accepted the case as a good one in which to test in the courts the much-discussed law of slavery, and perhaps to obtain damages, if successful.²

Dred Scott, who was wholly illiterate, understood little about what was going on, but in the fall of 1846, signed his cross to a petition in a suit against Mrs. Emerson for his freedom—technically an action for false imprisonment and assault. The jury gave a verdict against Scott, which was set

¹ BLOW, HENRY TAYLOR. (1817-1875.) Born Southampton Co., Va. His father Peter, removed to St. Louis in 1830; the son graduated at Washington University; became a manufacturer of drugs and oils and President of Collier White Lead Company. Member State Senate, 1854-1858. Delegate to Republican National Convention, 1860. U. S. Minister to Venezuela, 1861. Member U. S. Congress, 1862-1866. U. S. Minister to Brazil, 1869-1871. Commissioner District of Columbia, 1874. Died at Saratoga, N. Y. That Mr. Blow was behind the Scott suits is shown from the fact of his son-in-law, Joseph Charless, being on the bond on the appeal to the State Supreme Court, that he was on another bond given in the Circuit Court and was also Scott's bondsman in the subsequent action in the Federal Court. Hill (F. T.) pp. 119, 123.

² "Here was a slave who had not only been brought by his owner into Illinois, doubly protected against slavery by the ordinance of 1787 and its own constitution, but also into a territory where slavery was illegal under the Missouri Compromise and other Congressional legislation. Moreover, his marriage had been contracted on free soil and at least one of his children born beyond the jurisdiction of slavery. A better case for presenting the claim that the removal of slaves into free territory effected their emancipation could not well be imagined.

There is little likelihood, however, that it was this nice point of law or any humanitarian impulses that actuated the attorneys. Indeed, there is every indication that their motives were anything but disinterested, for the papers show that their main object was to pave the way for a suit against the Emerson estate for the twelve years' wages to which Scott would be entitled should the courts declare that he had been illegally held as a slave since 1834. Had it not been for this ulterior design it is highly improbable that the suit would ever have been defended." Hill (F. T.) p. 117.

aside, and a new trial ordered. An appeal to the Supreme Court of the State was dismissed without any discussion of the merits, that court ruling that no appeal would lie from an order that was not a final judgment.

THE TRIAL.³

*In the Circuit Court of St. Louis County, St. Louis, Missouri,
June, 1847.*

HON. ALEXANDER HAMILTON,⁴ *Judge.*

April 6, 1846.

The following Petitions and Order were filed today:

To the Hon. John M. Krum,⁵ Judge of the St. Louis Circuit Court:

Dred Scott, a man of color, respectfully states to your Honor that he is claimed as a slave by one Irene Emerson, of the County of St. Louis, State of Missouri, widow of the late Dr. John Emerson, who

³ *Bibliography.* "Reports of the Supreme Court of Missouri, Vol. XI. West Publishing Company, St. Paul, 1871."

"Reports of the Supreme Court of Missouri, Vol. XV. Cape Girardeau, Mo. Printed for the editor, 1872."

"Decisive Battles of the Law. By Frederick Trevor Hill. New York and London. Harper & Brothers, Publishers. MCMVII."

"Papers in the Dred Scott Case, St. Louis Circuit Court No. 1, Dred Scott v. Irene Emerson. No. 2, Harriet v. Emerson." Through the courtesy of the judges and the clerk, the editor was permitted the use of these rare historical documents. They are on file in the clerk's office and include the original petition signed by Dred Scott with his mark. The books of the court also contain most of the proceedings; the last judgment entered for the defendant after the reversal by the Supreme Court being recorded in Record 26, page 163.

"Address Before the Circuit Clerks' and Recorders' Convention, St. Louis, Mo., July 14, 1908. By Edmund Walsh, for more than 50 years employed in various clerical capacities at the St. Louis Courthouse." Pp. 19, 20.

For much of the matter in the biographical notes, the editor is under obligation to Mr. William Clark Breckenridge of St. Louis.

The trial was held in the St. Louis Court House, now one of the historical monuments of that city. It stands on a city block, bounded by Fourth, Market, Chestnut Streets and Broadway. The lot was donated to the City of St. Louis by Pierre Chouteau and J. B. C. Lucas, with a proviso in the deed that the ground should always be used for court-house purposes or revert to the heirs of

at the time of his death was a surgeon of the United States army. That the said John Emerson purchased your petitioner in the city of St. Louis about nine years ago, he then being a slave, from one Peter Blow, now deceased, and took petitioner with him to Rock Island, in the State of Illinois, and there kept petitioner to labor and service in attendance upon said Emerson for about two years and six months; he, the said Emerson, being attached to the United States troops there stationed, as surgeon. That after remaining at

the donors. It was begun in 1839 and completed in 1862. The architects were Henry Singleton, William Twombly, Robert S. Mitchell, Thomas D. P. Lanham, William Rumbold and Thomas Walsh. The building represents a Greek cross, with four entrances on the four streets with simple but massive and impressive Doric Columns. On the wide platforms and steps of these entrances, slaves were sold at auction for many years. The most admired part of the building is the dome, which was designed by Rumbold. The interior is most interesting. The bottom columns supporting the dome are the simplest form of the Doric. Above these are the Ionic. Still above these are the Corinthian, then the Composite, just as they came into use in architecture. The paintings in the dome are by Carl Weimar, a painter of Wild Western scenes who attained national fame. The most highly prized paintings in the old courthouse are the four oval panels over the four wings. The one in the Fourth Street wing represents Laclede landing at the foot of what is now Walnut Street to found St. Louis. The one in the Market Street wing shows DeSoto discovering the Mississippi River. That in the Chestnut Street wing represents an Indian attack on old St. Louis when it was a stockade town bounded by the river, Fourth Street, Walnut and St. Charles streets. The one in the Broadway wing illustrates a pass in the Rocky Mountains through which the gold seekers traveled to California.—*St. Louis Post-Dispatch*, September 4, 1919.

⁴ HAMILTON, ALEXANDER. (1812-1882.) Born Philadelphia, Pa. Educated in New Jersey. Removed to St. Louis, 1836, and was admitted to the bar in that year, and for half a century practiced law there. Judge St. Louis Circuit Court. 1847-1857. One of the founders of the St. Louis Law Library Ass'n. Died in St. Louis. "He was a fine lawyer; an industrious man, and greatly esteemed by all who knew him, for his kindly nature, his politeness, and his many good qualities." See "History of Bench and Bar of Missouri. Legal Publishing Company." (1898.),

⁵ See 5 Am. St. Tr. 548. Judge Krum did not preside at the trial, as he had then retired from the bench. "In 1844, he (John M. Krum), was appointed Judge of the St. Louis Circuit Court, which office he filled for two years." (Encyc. Hist. of St. Louis. Hyde and Conard. p. 1195.) "Judge Krum, finding that the onerous duties of his office were undermining his health, resigned his judgeship, and again resumed his profession." (Edwards' Great West, p. 555.)

the place last named for about the period aforesaid, said Emerson was removed from the garrison at Rock Island aforesaid, to Fort Snelling, on the St. Peter's river, in the territory of Iowa, and took petitioner with him, at which latter place, he, petitioner, continued to remain in attendance upon said Dr. John Emerson, doing labor and service for a period of about five years. That after the lapse of the period last named, said Emerson was ordered to Florida, and proceeding there, left petitioner at Jefferson Barracks in the County of St. Louis aforesaid, in charge of one Captain Bainbridge, to whom said Emerson hired petitioner. That said Emerson is now dead and his widow, the said Irene, claims petitioner's services as a slave and as his owner, but, believing that under this state of fact that he is entitled to his freedom, he prays your Honor to allow him to sue said Irene Emerson in said court, in order to establish his right to freedom, and he will pray, etc.

his
DRED X SCOTT.
mark

The judge of the St. Louis court grants the petitioner leave to sue, etc., as prayed for, and orders: First, that the petitioner, Dred Scott, be allowed to sue on giving security satisfactory to the clerk for all costs that may be adjudged against him.

Second, that said Dred Scott have reasonable liberty to attend his counsel and the court as occasion may require. And that he be not removed out of the jurisdiction of the court, and that he be not subject to any security on account of his application for freedom.

JOHN M. KRUM,

Judge St. Louis Circuit Court.

Dred Scott, a man of color, complains of Irene Emerson of a plea for that the said defendant on the fourth day of April, in the year eighteen hundred and forty-six, with force and arms, etc., made an assault upon the said plaintiff, to wit, at St. Louis, in the county aforesaid, and then and there beat, bruised and ill-treated him, the said plaintiff, and then and there imprisoned him, the said plaintiff, and kept and detained him in prison there without any reasonable or probable cause whatsoever, for a long time, to wit, for the space of 12 hours, then next following, contrary to the laws of the said State and the will of said plaintiff. And the said plaintiff avers that before and at the time of committing of the said grievances, he was and still is, a free person, and that the said defendant held, and still holds, him in slavery. To the plaintiff's damage ten dollars, and therefore he brings suit, etc.—F. B. Murdock, ^e Plff's Atty.

^e MURDOCK, FRANCIS B. No mention of him is found in any St. Louis or Missouri biographical work. St. Louis Direct. (1840-1): "Murdock, F. B., Attorney-at-Law, 20 Pine, res. 15 S. 7th." St. Louis Direct. (1842): "Murdock, F. B., Attorney-at-Law, res. Elm, bet. Fourth and Fifth." Green's St. Louis Direct. (1845): "Murdock,

On the same day a summons was issued by John Ruland, clerk of said court, commanding the defendant to appear at the next term to answer said petition. With it was filed a bond for costs executed by F. B. Murdock. The writ was served on the next by William Milburn, sheriff, by Henry B. Belt, deputy.⁷

April 9.

*George W. Goode*⁸ moved to dismiss the suit because the conditional order of the Court had not been complied with. Motion denied by the Court.

November 19.

Mr. Goode filed the following plea: The said defendant, by G. W. Goode, her attorney, comes and defends the force and injury when, etc., and says that she is not guilty of the said several grievances above laid to her charge or any or either of them or any part thereof in manner and form as the said plaintiff has above thereof complained against her; and of this she, the said defendant, puts herself upon the country.

May 7, 1847.

*Charles D. Drake*⁹ gave notice of the taking of depositions to

F. B., Attorney-at-Law, 12 N. 2nd." Green's St. Louis Direct (1847): "Murdock, Francis B., Attorney, 10 S. 4th, dw. 7th, opp. Elm." This is the last time his name appears in any St. Louis directory.

⁷ Similar papers were filed and similar proceedings had at the same time by Harriet, wife of the plaintiff. And a stipulation was signed by the attorneys on both sides that the judgment in her suit should abide by the decision in her husband's.

⁸ GOODE, GEORGE W. (1815-1863.) Born Henrico Co., Va. Married Fannie, daughter of Judge Robert Wash, of St. Louis. See Bay, Bench and Bar of Missouri, 569; "Virginia Cousins" (George Brown Goode, Va., 1887), says he was born in 1814 and died in 1860. See extracts from city directories below, giving last entry as 1860, but as he spent his last years in St. Louis County this fact (of his appearing no more in the directory) may be accounted for. Bay gives the dates as above. Green's St. Louis Direct. (1845): (first mention): "Goode, Geo. W., Attorney-at-Law, 97 Chestnut, upstairs." Sloss' St. Louis Direct (1848): "Goode, Geo. W., Attorney, 97 Chestnut." He also appears in the St. Louis city directories of 1851, 1852, 1854-5, 1857, 1859 and in 1860.

DRAKE, CHARLES DANIEL. (1811-1892.) Born Cincinnati, O. Served for a time in the navy, then studied law and was admitted to Bar, 1833; removed to St. Louis, where he became a prominent practitioner and politician; member of Constitutional Convention, 1864; United States Senator, 1867-1871; Chief Justice U. S. Court of Claims, 1871-1885; author of Law of Attachment, Life of Daniel Drake; Union and Anti-Slavery Speeches. Died in Washington, D. C.

be read on the trial on behalf of the plaintiff, on May 13th, at his office, and on May 10th at the residence of William Anderson, 90 Myrtle St., St. Louis.

June 30.

The trial began today.

*David N. Hall*¹⁰ and *Alexander P. Field*,¹¹ for the Plaintiff.

*Lyman D. Norris*¹² and *Hugh A. Garland*,¹³ for the Defendant.¹⁴

¹⁰ HALL, DAVID N. The St. Louis directories have the following: 1845 (published 1844): "Hall, D. N., 95 Chestnut. (1847): "Hall, D. N. Attorney, 43 N. 3d." (1848): "Hall, David N. (Field & Hall), 176 Market St." (1850): "Hall, D. N." (1851): "Hall, David N., Attorney." His name does not appear in any St. Louis directory after this. He is not mentioned in any Missouri or St. Louis biographical work, except in Scharf (Hist. St. Louis City and County), where it is said: "March 30, 1851, occurred the death of D. N. Hall, for ten years an active and estimable member of the St. Louis Bar." P. 1481.

¹¹ FIELD, ALEXANDER POPE. (1801-1876.) Son of Major Abner Field and Jane Pope (sister of Hon. Nathaniel Pope and aunt of Gen John Pope). Secretary of State Illinois, 1828-1840. Secretary Terr. of Wisconsin, 1841. Atty. Gen. Louisiana, 1873. See St. Louis city directories—(1845): "Field, A. P., Attorney-at-Law." (1847): "Field, Alex. P., Attorney, office, 43 N. Third, ups." (1848): "Field, Alexander P. (Field & Hall), Attorneys." (1850): "Field, A. P., 45 N. Third, ups." See also Field Genealogy (F. C. Pierce), Vol. II, pp. 1117, 1123-1126. Alexander Pope Field (Frank Stevens), Journal Ill. State Hist. Soc., 1911, Vol. IV, No. 1, pp. 7-37. Reminiscences Early Bench and Bar of Ill. (Usher F. Linder). Chicago. 1879. Pp. 204-208. Ill. State Hist. Library, No. 9. Transactions of Ill. State Hist. Soc. "Personal Recollections of Some of the Eminent Statesmen and Lawyers of Illinois" (C. P. Johnson, pp. 41-43). Hist. Encyc. Ill and Hist. St. Clair Co., Vol. I, pp. 164-5: "A. P. Field, formerly Secretary of State of Illinois, later Attorney General of Louisiana, the man who in earlier days had so ably conducted the prosecution of the members of the mob who killed Duncan in Madison County, Ill., was already increasing his reputation." Recollections of Criminal Practice in St. Louis (Chas. P. Johnson). Hist. of Bench and Bar of Missouri, A. J. D. Stewart, editor, St. Louis Legal Pub. Co. 1898.

¹² NORRIS, LYMAN DECATUR. The St. Louis directories have the following: "Norris, L. Decatur, Attorney, 64 Chestnut." (1851): "Norris, Lyman D. (Garland, Hugh A. & Norris)." (1852): "Norris, Lyman D. (Garland & Norris)." (1853-4): "Norris, Lyman D., Attorney-at-Law." (1854): "Norris, Lyman D., Attorney."

¹³ GARLAND, HUGH A. (1805-1854). Born Nelson Co., Va. Educated at Hampden-Sidney Coll., and became professor of Greek at

The following jurors were empaneled and sworn: John Sappington, Leonidas Willson, James Longworth, Benj. Berry, John Brudder, Thomas Brudder, Wm. Stanton, Richard Tumilty, Isaac Williams, Jno. M. Laughlin, Hugh Miller, Mathew McKinstry.

THE EVIDENCE.

Henry T. Blow. Plaintiff was formerly owned by my father; Peter Blow, who sold him to Dr. Emerson.

Samuel Russell. Dred Scott and his wife were hired by me from Mrs. Emerson, the wife of Dr. Emerson; I paid their hire to Colonel Sanford, the father of Mrs. Emerson.

Cross-examined. I did not hire the negroes myself, it was my wife who made the arrangement with Mrs. Emerson about them; know nothing of the hiring but what I have been told by my wife; did nothing but pay the hiring money to Colonel Sanford. I supposed that it was for Mrs. Emerson.

Miles H. Clark. I know the negro named Dred who is the plaintiff in this suit. I first knew Dred some time in the year 1834 at Rock Island in the State of Illinois. He was then a servant belonging to Dr. Emerson, who was then an assistant surgeon in

the army of the United States and was stationed at Rock Island. He was held in service there by Dr. Emerson as a slave from the time I first knew him until April or May, 1836. At that time Rock Island was evacuated by the troops to which Dr. Emerson was attached and the troops, with Dr. Emerson, went from Rock Island to Fort Snelling, which is situated at the junction of St. Peter's river with the Mississippi river on the west side of the Mississippi within the territorial limits of the United States and north of the State of Missouri. From the time the troops arrived at Fort Snelling until the 7th day of July, 1837, I knew Dred to be held by Dr. Emerson as a slave at Fort Snelling. At the last mentioned date I left that place. During all the time knew Dred at Rock Island and Fort Snelling he was claimed by Dr. Emerson as a slave and used by him

Univ. of Va. Studied law and began practice at Boydton, Va., 1830. Member Va. Legislature. Removed to St. Louis in 1840 and practiced there until his death. The resolutions of the St. Louis Bar upon his death appear in the St. Louis Republican of October 16, 1854. The best sketch of his life is in "Biographical Sketches of Distinguished Americans Now Living, by John Livingston of the New York Bar (New York, 1853)." See pp. 286-294. See also, "The Literature of the Louisiana Territory (A. N. DeMenil, St. Louis, Mo., 1904)," pp. 107-111. See also "Hist. St. Louis City and County (J. Thomas Scharf)," p. 1484.

¹⁴ Though Messrs. Drake, Bay, Lackland and Murdock and Goode filed pleadings and took depositions in the case, they do not seem to have taken part in the trial.

as such. During the time I have mentioned I was in the army of the United States and attached to the same troops to which Dr. Emerson was attached.

I am now second lieutenant in Capt. McNair's company of volunteers known as the "Missouri Guards," raised for service in New Mexico, and expect probably some time next week the company will leave for its destination.

Catherine A. Anderson. I reside in St. Louis; know Dred Scott. During the years 1837 and 1838 I knew him as a slave at Fort Snelling at the mouth of St. Peter's river on the west side of the Mississippi river within the territorial limits of the United States. Said Scott at this time was a slave of a Dr. Emerson, a surgeon in the United States army who was then posted at Fort Snelling. I knew the plaintiff to be held for only one year by said Emerson as a slave. During that time said Emerson exercised control over and used plaintiff entirely as a slave. Since that time I have only seen plaintiff occasionally. I know Harriet, the wife of said Dred Scott. I first knew her at Fort Snelling. She, too, was a slave of Dr. Emerson at the same time that I knew Dred there.

The *Jury* returned a verdict for the Defendant.

June 30.

*S. M. Bay*¹⁵ moves for a new trial because the verdict is against the law and evidence.

¹⁵ *BAY, SAMUEL MANSFIELD.* (1810-1849.) Born in Hudson, N. Y. "He received a good education at Hudson Academy, and spent two years in Washington City as a pupil in the private school of Salmon P. Chase, afterwards Chief Justice of the Supreme Court of the United States. On his return to New York he found employment in an importing house and was sent to Europe on business. On the completion of his mission, he came back and studied

This woman, in the year 1837, was hired to me as a servant by Dr. Emerson and was in my family some two or three months. I knew said woman for the same length of time that I did Dred. During that whole time she was held in slavery by Dr. Emerson. When I went to Fort Snelling to live I found Dr. Emerson posted there. How long he had been there I do not know. Dr. Emerson left Fort Snelling in the fall of 1837 but left these slaves there, hired out. They remained there until April, 1838, when they left for the South for Fort Gibson, I think. During the whole time that I knew them at Fort Snelling they were held in slavery by Dr. Emerson or by persons to whom they were hired by him. They were universally known there to be Dr. Emerson's slaves. At the time that I was at Fort Snelling my name was Thompson, I was then the wife of James L. Thompson, a lieutenant in the army of the United States. The plaintiffs in these cases are now in St. Louis, and I have been informed and believe, are at Mr. Samuel Russell's. I was at Fort Snelling in the latter part of May or first of June, 1837, and left in May, 1838.

July 1,

Mr. Bay renews his motion for a new trial for the following additional reason in addition to those given yesterday, viz.: because the plaintiff was surprised by the testimony of the witness Russell, and files the following affidavit:

Dred Scott, the plaintiff in this case, in support of his motion for a new trial, states upon oath that he was surprised in the testimony of the witness Samuel Russell by whom he expected to prove that he, this affiant, was hired as a slave by said Russell from the defendant previous to the commencement of this suit and that said Russell paid to said defendant money for the hire of this affiant as a slave and that he did not know previous to or at the trial of said cause that he could prove said facts or could prove that he was claimed as a slave or held in slavery by said defendant by any other person than said Russell, and therefore relied solely upon the testimony of said Russell to prove such facts as were necessary to maintain said suit against said defendant as the person holding this affiant in slavery. This affiant in support of this affidavit makes an exhibit of a certain letter addressed to said Russell by J. R. Lackland,¹⁶ one of the counsel of this affiant, and the answer of said Russell to the said letter, from which it will appear that previous to said trial said Russell informed said Lackland that he, said Russell, hired this affiant in March, 1846, from the defendant and that he, said Russell, paid the said hire of this affiant to said defendant.¹⁷

law with Judge Swayne at Columbus, Ohio. In 1833, he came to Missouri and located at Union, the county seat of Franklin County, where he soon had a good practice. In 1836 he was elected to the legislature (from this county) and at the close of his term made Jefferson City his home and became one of the most successful lawyers of that bar. In 1839, Gov. Boggs appointed him Attorney General of the State, and he held that position until 1845. Afterward he formed a partnership with Abiel Leonard, and continued the practice of his profession at Jefferson City, with success until 1847, when he removed to St. Louis and became attorney for the Old Bank of the State. He was in the midst of a large practice when he was taken down with cholera and died." (In July, 1849.) "Conard Encyc. History of Missouri," Vol. 1, p. 186. Sloss' St. Louis Direct. (1848): "Bay, S. M., Attorney-at-Law," res. 15 Chestnut. "Reminiscences Bench and Bar of Missouri." (W. V. N. Bay.) He was the oldest brother of the author. Hist. St. Louis City and County (J. Thomas Scharf). p. 1477.

¹⁶ See 2 Am. St. Tr. 206.

¹⁷ The following is the correspondence referred to:

June 2, 1847.

Mr. Russell. Sir: You will answer and furnish me with date upon which you hired Dred Scott to work for you. From whom you hired him, whether from Mrs. Emerson or any one acting

This affiant further states that relying solely upon the testimony of said Russell to prove these facts and knowing no other person by whom he could prove the same facts or other facts tending to the same end, he went into trial. When to his surprise said Russell testified in effect that he did not hire this affiant from said defendant, nor did he pay said hire to said defendant but that his knowledge of such facts was solely derived from the information of his wife. This affiant thus taken by surprise in the testimony of said Russell was unable to establish said facts to the satisfaction of the jury for which reason he supposes a verdict was rendered against him.

This affiant states that previous to said trial he had no knowledge that the wife of said Russell had any knowledge that this affiant was held in slavery by said defendant but that if a new trial is granted to him he expects to prove by the testimony of the wife of said Russell that said defendant, previous to the commencement of said suit hired this affiant to the wife of said Russell, acting as the agent of her said husband and that her acts in this respect were ratified and approved by her said husband and that said defendant claimed this affiant as her slave.

This affiant avows that the facts set forth in his petition to sue for his freedom are true—that he was and is a free man and was at the time of the commencement of this suit held in slavery by said defendant. That the verdict against this affiant is unjust and oppressive tending to deprive him of rights to which he is entitled by the law of the land—and that upon a new trial he will be able to establish his right to freedom and to prove that he was and is unjustly held in slavery by said defendant.

JUDGE HAMILTON granted a new trial.

March 14, 1846.

JUDGE HAMILTON signed and filed a bill of exceptions for the defendant's appeal to the Supreme Court.

Mr. Goode asked that an order be made directing the Sheriff to take the plaintiff and his wife, Harriet, and hire them out during the pendency of this suit and also that he be directed to take from the person so hiring a bond in sufficient penalty and with sufficient security to pay the hire of said slave and to abide the determination of this suit and to produce them according as the judgment of the court may require, and that the Sheriff return into court the bonds taken by him as such security.

as her agent and to whom you have paid the wages arising therefrom.

Yours respectfully,

J. R. Lackland.

You will please state the same facts in regard to his wife.

Mr. J. R. Lackland. Dear Sir: I hired Dred and his wife in March, '46, from Mrs. Emerson. I paid the hire of the servants to Mrs. Emerson until after she left for Fort Snelling. During her absence Mr. Sanford collected amount of their hire.

June 2, '47.

S. Russell.

The order was made by the COURT.

The Sheriff made a return of a bond signed by Edmund Labeaume and Henry T. Blow, the former as principal and the latter as security in the sum of \$600, and which recited: "The condition of the above obligation is such that whereas a suit has been instituted in the St. Louis Circuit Court for freedom in favor of Dred Scott against Irene Emerson and the said Dred Scott has been by order of said court hired out by the Sheriff of said county to the said C. Edmond Lebeaume for the term of one year from this date or until the termination of said suit at the rate of five dollars per month. Now if the said C. E. Labeaume shall not remove the said Dred Scott out of the jurisdiction of said St. Louis Circuit Court, shall pay to the said Sheriff the said sum of \$5.00 per month and return the said Dred Scott at the expiration of months from this date or at the termination of said suit then this obligation to be null and void, otherwise to remain in full force and virtue."

The Supreme Court refused to interfere with the order for a new trial on the ground that it was not a final judgment on which a writ of error would lie.¹⁸

¹⁸ Emerson v. Dred Scott (of color), 2 Mo. 413. At the same time the action by Scott's wife was decided the same way. Emerson v. Harriet (of color), 2 Mo. 413.

**THE SECOND TRIAL OF THE ACTION OF DRED
SCOTT (A SLAVE) AGAINST IRENE EMERSON,
FOR FALSE IMPRISONMENT AND ASSAULT.
ST. LOUIS, MISSOURI, 1850.**

THE NARRATIVE.

The second trial came on in January, 1850, and resulted in a victory for the slave. But the triumph of his friends was short lived, for in March, 1852, six years after the action was started, the Supreme Court of Missouri reversed the case and remanded Dred Scott to slavery.

In the meantime conditions had changed so as to permit the friends of the slave and of freedom to get the case into the United States Court, where a nation-wide decision might be obtained, and which led the way to a *cause celebre*, destined to make history and to prove one of the provocations of the Civil War.^a

THE TRIAL

*In the Circuit Court of St. Louis County, St. Louis, January,
1850.*

HON. ALEXANDER HAMILTON,¹ *Judge.*

January 12.

The proceedings on the new trial began today, with the following jury: Calvin Harris, C. H. Vosburg, Wm. Syphert, H. S. Taylor, Robert West, Jno. C. Morris, L. P. Granthans, L. Whyland, D. Welsh, C. W. Granthans, A. H. Foster, N. W. Sterrchenn.

*D. N. Hall*² and *A. P. Field*,³ for the Plaintiff.

^a See *post*, p. 242, *Dred Scott v. Sanford*.

^a Hill (F. T.), p. 117.

¹ See *ante*, p. 224.

² See *ante*, p. 227.

³ See *ante*, p. 227.

*Lyman D. Norris*⁴ and *Hugh A. Garland*⁵ for the Defendant.

THE EVIDENCE

The evidence was the same as on the first trial except of one witness:⁶

Adeline Russell. Am the wife of Mr. Russell who has just testified; did not know Dr. Emerson; was acquainted with Mrs. Emerson; have known her eight or ten or twelve years; know the plaintiffs in these suits—they were in my service for two years or almost that time; have known them some four or five years; they were under the control of Mrs. Emerson; engaged them of Mrs. Emerson but they were delivered to me by Mr. Sanford, her father; Mrs. Emerson claimed these negroes as her slaves; do not recollect if I heard Mrs. Emerson say they were her slaves; do not recollect if I paid for their services to Mrs. Emerson or Mr. Sanford,

as her agent; think Mr. Russell paid for their services; think it has been between two or three years since they left my house; think Mrs. Emerson resided at Mississippi or Missouri river before they were in my service. At the time I hired these negroes they were in the service of Col. Bainbridge.

Cross-examined. The only way I know these negroes belonged to Mrs. Emerson is that she hired them to me; think it probable that both Mrs. Emerson and Mr. Sanford at times received pay for their services; do not know if the plaintiff's residence was at Mississippi or Missouri river; do not know if Mr. Sanford was the agent of Mrs. Emerson, owner of the negroes.

The *Counsel for the Plaintiff* asked the Court to instruct the jury:

1. If they believe from the evidence that the defendant hired the plaintiff as a slave to the witness Russell, previous to the commencement of the suit such hiring is evidence as against the defendant of holding the plaintiff in slavery within the meaning of the act concerning "freedom."

2. If they believe from the evidence that the defendant hired the plaintiff as a slave to the witness Russell, it is no answer to such act of hiring that the defendant acted as the agent of or on behalf of others.

3. Hiring a person as a slave who is entitled to his freedom or claiming and receiving pay for such hire is evidence of holding such person in slavery within the meaning of the act concerning "freedom."

⁴ See *ante*, p. 227.

⁵ See *ante*, p. 227.

⁶ By deposition which was read by counsel.

4. If they believe from the evidence that at any time after the 6th day of March, 1820, the plaintiff was held in slavery by the deceased Dr. Emerson at Fort Snelling or any other place in the territory ceded by France to the United States under the name of Louisiana which lies north of 9 degrees 30 minutes north latitude, not included within the limits of the state of Missouri and that at the time he was held in slavery he was the property of said Emerson, then said Plaintiff is entitled to his freedom.

5. If the jury believe from the evidence that the plaintiff was held in slavery by the deceased Doctor Emerson at Fort Snelling, situated in the territory of the United States northwest of the river Ohio, as defined by the Act of Congress of July 1, 1787, entitled, "An ordinance for the government of the Territory of the United States northwest of the river Ohio" at any time after said ordinance went into effect and at the time he was so held in slavery he was the property of said Emerson, then said Plaintiff is entitled to his freedom.

The COURT gave the instructions as requested.

The *Counsel for the Defendant* asked the following instructions, which were refused by the COURT:

If the jury believe from the evidence that Dr. Emerson was an officer of the United States army, that he was the owner of the slaves Dred Scott and Harriet, his wife, before he was ordered to Rock Island and Fort Snelling; that he took said slaves with him as domestic servants when ordered to these posts; that they remained as servants at those posts, Rock Island and Fort Snelling, and no where else, until they were brought to St. Louis, in a slave state; and if they believe that the posts at Rock Island and Fort Snelling during the residence of said slaves, each of them respectively was under military jurisdiction and not under the civil government of the territory then in existence, they must find for the defendant.

Mr. Norris. Gentlemen: The authorities in this State are conflicting but the best considered judicial opinion is that if the slave comes back here although he has been in a free territory, he becomes a slave again. Dr. Emerson did not violate the Missouri Compromise law by obeying the orders of his government and going to the military posts in free territory. The voluntary return of the slave places him under the operation of our local laws and the rights of his master, if ever divested, reattach the moment they are again in a State that recognizes the institution of domestic slavery. I

do not deem it necessary to recur to the history of the Missouri Compromise which is well known to all of us and of which we may say, *magna pars quorum fuimus*.

Rapidly increasing in wealth, population and power, Missouri claimed admission into the Union on an equality with her sister States. Then commenced the agitation, the history, objects and effects of which your honor is as familiar with as with household words. If the historians and writers of the day are to be believed, it was deep-seated and wide-spread excitement, that for a long time threatened the existence of the Union and the perpetuity of free institutions. It was the periodical appearance of an epidemical disease, a species of "black vomit" that ever has and will we hope continue to carry unfledged statesmen and "higher law" demagogues to the grave of political oblivion. With an earnest desire to calm the storm that has been awakened, Missouri under protest, accepted the Compromise act of the great statesman who originated it and neither waiving her just views of the constitutional powers of Congress to impose the condition nor to recognize the right of any created being to control or weaken in any manner her State rights, she came into the Union.

In passing, whatever may be our views of the expediency of compromise in questions of legal or moral right, we cannot refrain from paying an humble tribute to the patriotism, sincerity, eloquence and honesty of purpose of the statesman, who as the father of the compromise adjustments, has so often ruled the whirlwind of popular fury. Then his star had just appeared in the east—it has approached and passed the zenith of its power and now is slowly sinking in the western horizon. We discern no paling of its intellectual fires—it shines with an effulgence, not dazzling and brilliant, as in its meridian splendor, but like the mellow light of the harvest moon—mild, fructifying, peaceful. It will soon pass away forever, and may there be both friend and foe who will unite in sorrow over the tomb of Henry Clay in wishing

"Peace to the just man's memory,
Let it grow green in the lapse of time,
And blossom through the flight of ages."

Suppose Congress should pass a law declaring that the keeping of black horses, a species of property existing in Missouri and recognized by the Constitution of the United States and of Missouri shall be and the same is hereby prohibited in the territory of Utah. The same government that passes the law through the executive department orders an officer who unfortunately owns a black horse, that he can neither sell, lose nor give away, to the territory of Utah, and he takes with him his said horse (I admit that the horse, if there were horse abolitionists there, would get his freedom in Utah); but when he comes back here and asks you to give him up, would you do it? This is perhaps a strong and coarse illustration, but is it not a case in point?

I will close with the words of wisdom uttered by our own Judge Napton in a recent case: "Neither sound policy nor enlightened philanthropy should encourage in a slave-holding state the multiplication of a race whose condition could be neither that of freemen nor slaves and whose existence and increase in this anomalous character, without promoting their individual comfort or happiness tends only to dissatisfy and corrupt those of their own race and color remaining in a state of servitude."

Mr. Hall. The Court instructed you that the taking and holding of the plaintiff as a slave at Rock Island and Fort Snelling entitled him to his freedom. The fact that they were military posts does not affect his rights. Even if he could not acquire a right to his freedom in consequence of the right of Dr. Emerson to employ and have servants for his own use there, he would acquire such freedom by being left by the deceased in the services of others as a slave, after he himself was removed by orders to a different post, which the evidence shows was a fact.

The *Jury* returned a verdict for the plaintiff.

MR. GARLAND moved for a new trial on the grounds: 1. The verdict was contrary to law. 2. The verdict was not supported by the evidence. 3. The instructions asked for by the plaintiff's

counsel and given by the court were not according to the law and evidence. 4. The court erred in refusing the instructions asked by the defendant's counsel.

JUDGE HAMILTON refused to grant a new trial.

February 13.

JUDGE HAMILTON signed the defendant's bill of exceptions for the appeal to the Supreme Court.

The defendant appealed to the Supreme Court, which in March, 1852, set aside the judgment making Dred Scott a freeman, and remanded him to slavery.⁸ The Supreme Court ruled that although Scott may have become free when he was taken by his master into free territory, yet by voluntarily returning to Missouri—a slave state—he had resumed his status as a slave.

The opinion of the majority of the court which was delivered by Mr. Justice Scott,⁹ was as follows: "The States of this Union, although associated for some purposes of government, yet, in relation to their municipal concerns, have always been regarded as foreign to each other. The courts of one State do not take judicial notice of the laws of other States. They, when it is necessary to be shown what they are, must be proved like other facts. So of the laws of the United States, enacted for the mere purpose of governing a Territory. These laws have no force in the States of the Union; they are local, and relate to the municipal affairs of the Territory." "Every State has the right of determining how far, in a spirit of comity, it will respect the laws of other States. Those laws have no intrinsic right to be enforced beyond the limits of the State for which they were enacted. The respect allowed them will depend altogether on their conformity to the policy of our institutions. No State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws." "It is a humiliating spectacle, to see the courts of a State confiscating the property of her own citizens by the command of foreign law. If Scott is freed, by what means will it be effected, but by the Constitution of the State of Illinois, or the Territorial laws of the

⁸ Scott (a man of color) v. Emerson, 15 Mo. 577.

⁹ SCOTT, WILLIAM. (1804-1862.) Born Warrenton, Va. Educated Fauquier Academy and admitted to Bar, 1825. Removed to Missouri (Old Franklin), 1826; Judge 9th Judicial Circuit, 1835-1840; Judge Supreme Court Missouri, 1841-1860. "He became one of the most eminent and profound jurists that ever adorned the western Bench, and his opinions contained in the Missouri Reports form no inconsiderable part of our judicial learning."—Bay (Bench and Bar, Mo.) 325. Died in Jefferson City.

United States? Now, what principle requires the interference of this court? Are not those governments capable of enforcing their own laws; and if they are not, are we concerned that such laws should be enforced, and that, too, at the cost of our own citizens? States, in which an absolute prohibition of slavery prevails, maintain that if a slave, with the consent of his master, touch their soil, he thereby becomes free. The prohibition in the act, commonly called the Missouri Compromise, is absolute." "Now, are we prepared to say that we shall suffer these laws to be enforced in our courts? On almost three sides the State of Missouri is surrounded by free soil. If one of our slaves touch that soil with his master's assent, he becomes entitled to his freedom. If a master sends his slave to hunt his horses or cattle beyond the boundary, shall he thereby be liberated? But our courts, it is said, will not go so far. If not go the entire length, why go at all? The obligation to enforce to the proper degree, is as obligatory as to enforce to any degree. Slavery is introduced by a continuance in the Territory for six hours as well as for twelve months, and so far as our laws are concerned, the offense is as great in the one case as in the other. Laws operate only within the territory of the State for which they are made, and by enforcing them here, we, contrary to all principle, give them an extra-territorial effect."

"There is no ground to presume or impute any volition to Dr. Emerson, that his slave should have his freedom. He was ordered by superior authority to the posts where his slave was detained in servitude, and in obedience to that authority, he repaired to them with his servant, as he very naturally supposed he had a right to do. To construe this into an assent to his slave's freedom would be doing violence to his acts. Nothing but a persuasion, that it is a duty to enforce the foreign law as though it was our own, could ever induce a court to put such a construction on his conduct."

"An attempt has been made to show that the comity extended to the laws of other States is a matter of discretion, to be determined by the courts of that other State in which the laws are proposed to be enforced. If it is a matter of discretion, that discretion must be controlled by circumstances. Times now are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may, for our own sakes, regret that the avarice and hardheartedness of the progenitors of those who are now so sensitive on the subject ever introduced the institution among us, yet we will not go to them to learn law, morality, or religion, on the subject."

Mr. Justice Gamble¹⁰ dissented for the following reasons: "In every slaveholding State in the Union, the subject of emancipation is regulated by statute, and the forms are prescribed in which it shall be effected. Whenever the forms, required by the laws of the State in which the master and slave are resident, are complied with, the emancipation is complete, and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which he and his former master resided; and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by the law of the State in which the court is sitting.

"In all such cases, courts continually administer the law of the country where the right was acquired; and when that law becomes known to the court, it is just as much a matter of course to decide the rights of the parties according to its requirements, as it is to settle the title of real estate, situate in our State, according to our own laws.

"We, here, are the citizens of one nation, composed of many different States which are all equal, and are each and all entitled to manage their own domestic interests and institutions by their own municipal law, except so far as the Constitution of the United States interferes with that power. The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the Constitution of the United States gives no power to the general government, it is left to be adopted or rejected by the several States, as they think best. Nor can any one State, nor any number of States, claim the right to interfere with any other State, upon the question of admitting or excluding this institution. It must be borne in mind, that this freedom and equality of the different States supposes that each can, of its own will, according to its own judgment, exclude slavery, with as little cause of offense to any of the other States, as if its decision was in favor of admitting it. As citizens of a slaveholding State, we have no right to complain of our neighbors of Illinois, because they introduce into their state Constitution a prohibition of slavery; nor has any citizen of Missouri, who removes with his slave to Illinois, a right to complain that the fundamental law of the State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his voluntary act, as if he had executed a deed of emancipation.

¹⁰ GAMBLE, HAMILTON ROWAN. (1798-1864.) Born Winchester Co., Va. Educated Hampden Sidney College. Removed to Missouri (Old Franklin), 1818. Prosecuting Atty., 1820; Secretary of State, 1824; Removed to St. Louis, 1826; Member of Mo. Legislature, 1846; Judge Supreme Court, 1851-1855; Governor of Mo., 1861-1864. Died in St. Louis.

Nor can any man pretend ignorance, that such is the design and effect of the constitutional provision. The decisions which have heretofore been made in this State, and in many other slaveholding States, give effect to this and other similar provisions, on the ground that the master, by making the free State the residence of his slave, has voluntarily subjected himself and property to a law, the operation of which he was bound to know. It would seem difficult to make any sound distinction between the effect of an emancipation produced by the act of the master, in thus voluntarily placing his slave under the operation of such a law, and that of an emancipation produced by the act of the master, by the execution of an instrument of writing in any State where the slave resided, which, according to the law of that State, would be sufficient to discharge the slave from servitude, although it might not be a valid emancipation under the laws of another State.

"While I merely glance at the reasons which might be urged in support of the present plaintiff's claim to freedom, if it were an original question, I do not propose to rest my dissent from the opinion given in this case, upon the original reasoning in support of the position. I regard the question as conclusively settled, by repeated adjudications of this court, and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them, than I would any other series of decisions, by which the law upon any other question was settled. There is, with me, nothing in the law relating to slavery, which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary public excitements which are gathered around it." "In the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend. In this State, it has been recognized, from the beginning of the government, as a correct position in law, that a master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave. *Winney v. Whitesides*, 1 Mo. Rep. 473; *LeGrange v. Chouteau*, 2 Mo. Rep. 20; *Milley v. Smith*, *Ibid.* 36; *Ralph v. Duncan*, 3 Mo. Rep. 194; *Julia v. McKinney*, *Ibid.* 270; *Natt v. Ruddle*, *Ibid.* 400; *Rachael v. Walker*, 4 Mo. Rep. 350; *Wilson v. Melvin*, *Ibid.* 592. These decisions, which come down to the year 1837, seem to have so fully settled the question, that since that time there has been no case bringing it before the court for any reconsideration until the present." "The cases here referred to are cases decided when the public mind was tranquil, and when the tribunals maintained in their decisions the principles which had always received the approbation of an enlightened public opinion. Times may have changed, public opinion may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decisions, but in those principles, which are immutable."

**THE TRIAL OF THE ACTION OF DRED SCOTT
(A SLAVE) AGAINST JOHN F. A. SANFORD¹
FOR FALSE IMPRISONMENT AND
ASSAULT, ST. LOUIS,
MISSOURI, 1854.**

THE NARRATIVE.

Early in 1850 Mrs. Emerson had married Dr. Calvin C. Chaffee,² a physician and a member of Congress from Springfield, Mass., and her husband being an abolitionist, the nominal title to the Scott family had been transferred to the other executor, John F. A. Sanford, who was a resident of New York. It was therefore possible by describing Dred Scott as a citizen of Missouri and Mr. Sanford as a citizen of New York—thus creating an issue between citizens of different States—to give the United States Court jurisdiction. This was at once done. Roswell M. Field, one of the foremost lawyers of St. Louis, was retained, and in November, 1853, he instituted a new action for Dred Scott in the United States Court at St. Louis.³

This time Scott sued not only for himself but for his wife and two daughters. The lawyers drew up an agreed statement of the facts, and in May, 1854, the trial came on. But the Federal Judge ruled that the only verdict the jury could give was in favor of the defendant, and following his instructions, the jury declared Scott and his family the lawful property of the defendant. Mr. Field appealed to the Supreme Court of the United States at Washington.

¹ When the case got to the Supreme Court at Washington, and in all the official reports, his name is misspelled "Sandford."

² CHAFFEE, CALVIN C. Born 1811 at Saratoga, N. Y. Representative in Congress from Massachusetts, 1855-1859. Librarian, House of Representatives, 1859.

³ Scott was then working as a janitor in R. M. Field's office. See Mo. Bar Ass'n reports (1907), p. 233.

Abolitionists all over the country now took a hand, and Montgomery Blair of Washington and George Ticknor Curtis of Boston volunteered their services. And the slavery party was represented in the highest court by Henry S. Geyer, the leader of the St. Louis bar and Reverdy Johnson, the great Maryland advocate. The case was twice argued, and on March 6, 1857, the Supreme Court rendered its unexpected and historical decision. It declared not only that the descendant of a black man, whether he was a slave or free, could not be a "citizen," and therefore could not bring an action in a United States court, but that all slavery restrictions by Congress were unconstitutional.

THE TRIAL.⁴

In the Circuit Court of the United States, St. Louis, Missouri, 1854.

HON. ROBERT W. WELLS,⁵ *District Judge.*

May 15.

On November 2, 1853, Dred Scott brought an action of trespass against John F. A. Sanford.

⁴ *Bibliography.* "The case of Dred Scott in the Supreme Court of the United States, December Term, 1854." This rare publication, a copy of which is in the Lawson Library of Criminology (Univ. of Mo.), is a pamphlet of 12 pages, containing a copy of the record in the Federal Court at St. Louis. The different pleadings are set out in full, and at the end is the certificate under seal of Benjamin F. Hickman, clerk of the Circuit Court of the United States for the District of Missouri, and dated May 25, 1854, that it contains "a full and complete transcript of the record and proceedings had in said court in the case of Dred Scott against John A. Sanford as the same remains on file in my office." This pamphlet contains the following preface:

"To my fellow-men: I lay before you the record of a suit which I have brought to get the freedom of myself, my wife and children. I was born in the State of Virginia and was held as a slave there, and in the State of Missouri, up to 1834.

The defendant says that I am a negro of African descent and that my ancestors were of pure African blood and were brought into this country and sold as negro slaves. All this is true. There is not a drop of the white man's blood in my veins. My ancestors

The declaration of Scott contained three counts: one, that Sanford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza

were free people of Africa. In 1834 my master took me from Missouri into the State of Illinois and held me there as a slave for two years. I was then carried by him to Fort Snelling on the Upper Mississippi, in the territory called Wisconsin and kept there as a slave two years longer. At Fort Snelling I became acquainted with Harriet, a negro woman who was held there as a slave by an officer of the United States army. My master bought Harriet and with his consent I married her. Our oldest daughter, Eliza, was born while we were living in Wisconsin.

In 1838 my master carried me and my wife and child to Missouri where we have all been kept as slaves ever since. I have had several children here, all of whom are dead except my daughter Lizzie. My old master is dead, too. About 18 months since, I and my family were traded off to the defendant. Last fall I brought my present freedom suit in the Circuit Court of the United States at St. Louis. The judge who tried the case read from the constitution of Illinois, made in 1818, that neither slavery nor involuntary servitude should be introduced into that State; and that any violation of this provision should effect the emancipation of the person from his obligation to service. He also read from an act of Congress passed in 1820 that in all the territory north of Missouri slavery and involuntary servitude should be forever prohibited. The judge said that according to these laws while I was in Illinois and Wisconsin I was a free man—just as good as my master—and that I had as much right to make a slave of a white man as a white man to make a slave of me. I was sorry nobody ever told me that while I was there. Yet I was glad to have the judge talk so for I thought he would set me free. But after a little while the judge said that as soon as my master got me back this side of the line of Missouri, my right to be free was gone; and that I and my wife and children became nothing but so many pieces of property. I thought it hard that white men should draw a line of their own on the face of the earth and on one side of which a black man was to become no man at all, and never say a word to the black man about it until they had got him on that side of the line. So I appealed to the Supreme Court of the United States. My case will be heard at the next term, beginning in December. I am now in the hands of the sheriff of this county, who hires me out and receives my wages. I am not at liberty to go out of the county. I have no money to pay anybody at Washington to speak for me. My fellow-men, can any of you help me in my day of trial? Will nobody speak for me at Washington, even without hope of other reward than the blessings of a poor black man and his family. I do not know. I can only pray that some good heart

Scott and Lizzie Scott, his children. In each count damages were laid in the sum of three thousand dollars.*

will be moved by pity to do that for me which I cannot do for myself; and that if the right is on my side it may be so declared by the high court to which I have appealed. St. Louis, Mo., July 4, 1854.

his
DRED X SCOTT.
mark

It was not, of course, written by the slave, but by some friend of freedom with the avowed purpose of raising money for the expenses of the appeal.

*"A Report of the Decision of the Supreme Court of the United States, and the Opinions of the Judges thereof, in the case of Dred Scott versus John F. A. Sandford; December term, 1856. By Benjamin C. Howard, Counsellor at Law and Reporter of the Decisions of the Supreme Court of the United States. D. Appleton & Co., 346-348 Broadway, New York, 1857." To this there is the following note on page 2: "In consequence of the general desire of the public to have access to these opinions, in a smaller book than the official volume of the Reports of the Supreme Court, I have determined to print that part of the volume which contains them in the following separate publication. Benjamin C. Howard, Reporter."

*"The Case of Dred Scott in the United States Supreme Court, the full opinions of Chief Justice Taney and Justice Curtis and abstracts of the opinions of the Other Judges, with an analysis of the points ruled and some concluding observations. New York. Horace Greeley & Co., Tribune Buildings. 1857."

*"Howard's Reports of the Decisions of the Supreme Court of the United States. Vol. 19."

*"A Legal Review of the Case of Dred Scott as Decided by the Supreme Court of the United States. From the Law Reporter of June, 1857. Boston. Crosby, Nichols & Co., 1857."

*"Historical and Legal Examination of that part of the Decision of the Supreme Court of the United States in the Dred Scott Case which declare the Unconstitutionality of the Missouri Compromise act and the Self extension of the Constitution to Territories, carrying slavery with it. With an Appendix. By the Author of the Thirty Years View (Thomas H. Benton), New York. D. Appleton & Company, 1857."

*"Decisive Battles of the Law. By Frederick Trevor Hill. New York and London. Harper & Brothers, Publishers, MCMVII."

*"Legal and Historical Status of the Dred Scott Decision. By Elbert W. R. Ewing, L. L. B. Washington, D. C. Cobden Publishing Co., 1909."

* WELLS, ROBERT W. (1795-1864.) Born Frederick Co., Va. Received early education at Winchester; removed to Ohio where he studied law with Judge Vinton at Marietta; removed to Missouri at

On April 7, 1854, Sanford filed the following plea to the jurisdiction of the court:

And the said John F. A. Sanford, in his own proper person, comes and says that this court ought not to have or take further

request of Mr. Rector, then principal deputy surveyor for the territory; settled at St. Charles (1818) and began practice of law; member of first Missouri general assembly and President of Constitutional Convention; became Attorney General, 1826, and removed to Jefferson City when it was selected as the capital; United States District Judge, 1836-1864; author of Wells' Code Missouri Practice (1849); died at Bowling Green, Ky.

⁶ Dred Scott, of St. Louis, in the State of Missouri and a citizen of the State of Missouri, complains of John A. Sanford of the city of New York, and a citizen of the State of New York, in a plea of trespass; for that the defendant heretofore, to-wit, on the first day of January, A. D. 1853, at St. Louis, in the county of St. Louis, and state of Missouri, with force and arms assaulted the plaintiff and without law or right held him as a slave and imprisoned him for the space of six hours and more and then and there did threaten to beat the plaintiff and hold him imprisoned and restrained of his liberty, so that by means of such threats the plaintiff was put in fear and could not attend to his business, and thereby lost great gains and profits which he might have made and otherwise would have made in the prosecution of his business, to-wit, two thousand, five hundred dollars; and other wrongs to the plaintiff then and there did against the peace and to the damage of the plaintiff three thousand dollars.

And also for that the defendant heretofore on the first day of January, A. D. 1853, with force and arms at St. Louis aforesaid, an assault did make on Harriet Scott then and still, the wife of the plaintiff, and then and there did imprison said Harriett and hold her as a slave without law or right for the space of six hours and then and there did threaten to beat said Harriet and hold her as a slave so that by means of the premises said Harriet was put in great fear and pain and could not and did not attend to the plaintiff's business; and the plaintiff lost and was deprived of the society, comfort and assistance of his said wife and thereby lost great gains and profits of the value, to-wit, of twenty-five hundred dollars; and other wrongs to the plaintiff the defendant then and there did against the peace and to the plaintiff's damage three thousand dollars.

And also for the defendant heretofore, to-wit, on the first day of January, A. D. 1853, with force and arms at St. Louis, aforesaid, made an assault on Eliza Scott and Lizzie Scott, then and still infant daughters and servants of the plaintiff, and then and there imprisoned and held as slaves said Eliza and Lizzie for a long space of time, to-wit, six hours; and then and there did threaten to beat said Eliza and Lizzie and to hold them as slaves

cognizance of the action aforesaid, because he says that said cause of action, and each and every of them, (if any such have accrued to the said Dred Scott,) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to-wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African de-

and restrained them of their liberty so that by means of the premises said Eliza and Lizzie were put in great fear and could not and did not attend to plaintiff's business as otherwise they might and would have done; and the plaintiff thereby lost the comfort, society, service and assistance of his said children and servants of great value to-wit, twenty-five hundred dollars; and other wrongs to the plaintiff the defendant then and there did against the peace and to the damage of the plaintiff three thousand dollars.

And the plaintiff on account of the aforesaid several grievances brings suit, etc.

For April Term, 1854.

(By his Attorney) R. M. Field.

Upon the foregoing declaration the following summons issued: Missouri District.

The President of the United States.

To the Marshall of the Missouri District, Greeting:

You are hereby commanded to summon John F. A. Sanford, a citizen of the state of New York, that he be and appear before the Honorable Circuit Court of the United States for the District of Missouri, at the next term thereof to be held at the city of St. Louis, in and for said District on the first Monday of April next, and then and there to answer unto Dred Scott a citizen of the state of Missouri in plea of trespass to the damage of said plaintiff three thousand dollars. Hereof fail not and have you then and there this writ. Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the second day of November, A. D., 1853. Issued at office in the city of St. Louis under the seal of said court the day and year last aforesaid.

Ben F. Hickman, Clerk.

Upon which said summons the Marshall made the following return, viz:

I hereby certify that I executed the within summons on the within named John F. A. Sanford in the city of St. Louis, Missouri, on the second day of November, 1853, by offering to read the same and the copy of the declaration hereto attached, to and within the hearing of the said Sanford which he declined hearing, and asked for a copy of said declaration which I furnished him on this said 2nd day of November, 1853.

Thomas S. Bryant, Marshal, U. S., Mo. Dist.

By Robert K. Moore, Deputy.

scent; his ancestors were of pure African blood and were brought into this country and sold as negro slaves and this the said Sanford is ready to verify. This plea was sworn to on November 16, 1853, before Edward E. Allen, a Justice of the Peace.

On April 14 the plaintiff, by his attorney, filed a demurrer to this plea, and defendant's attorney replied.⁷

On April 24 the demurrer was argued by the attorneys on both sides and the next day the COURT sustained the demurrer.

On May 4 the defendant, in pursuance of an agreement between counsel, filed his pleas in bar of the action. These pleas were three: 1. Not guilty. 2. That plaintiff was a negro slave the lawful property of the defendant, and as such the defendant gently laid his hands upon him and thereby had only restrained him, as the defendant had a right to do. 3. That with respect to the wife and daughters of the plaintiff in the second and third counts of the declaration mentioned, the defendant had as to them only acted in the same manner and in virtue of the same legal right.⁸

⁷ And now comes the plaintiff and demurs in law to the plea of the defendant to the jurisdiction of the court and says that the said plea and the matters therein contained are not sufficient in law to preclude the Court of its jurisdiction of this case and that the plaintiff is not bound by law to comply to said plea; wherefore the plaintiff prays judgment of said plea and that the defendant answer further to the plaintiff's said action, etc. Field.

Defendant joins in the demurrer. Garland, for defendant.

⁸ And the said John F. A. Sanford, by H. A. Garland, his attorney, comes and defends the wrong and injury, when etc., and says that he is not guilty of the said supposed trespasses above laid to his charge, or any part thereof in manner and form as the said Dred Scott hath above thereof complained against him; and of this he the said Sanford putteth himself upon the country.

And for a further plea in this behalf as to the making the said assault upon the said Dred Scott upon the first count of the said declaration mentioned and imprisoning him and keeping and detaining him in prison, etc., the said Sanford by leave of the court first obtained says that the said Dred Scott ought not to have or maintain his aforesaid action thereof against him because he says that before and at the time when, etc., in the said first count mentioned the said Dred Scott was a negro slave, the lawful property of the defendant, and as such slave, he gently laid his hands

To the first plea the plaintiff joined issue, and to the second and third filed replications, alleging that the defendant of his own wrong and without the cause in his second and third pleas alleged committed the trespass.⁹

upon him and only restrained him of such liberty as he had a right to do; and this the said Sanford is ready to verify. Wherefore he prays judgment whether the said Scott ought to have or maintain his aforesaid action against him.

And for a further plea in this behalf as to the making the said assault upon Harriet the wife and Eliza and Lizzie the daughters of the said Dred Scott in the second and third counts of the said declaration mentioned and imprisoning them and keeping and detaining them in prison, etc., the said John F. A. Sanford by leave of the court obtained says that the said Dred Scott ought not to have or maintain his action aforesaid therefore against him, because he says that before and at the said time, etc., when etc., in the second and third counts mentioned, the said Harriet, wife of the said Scott, and Eliza and Lizzie his daughters, were the lawful slaves of the said Sanford; and as such slaves he gently laid his hands upon them and restrained them of their liberty as he had a right to do; and this he is ready to verify. Wherefore he prays judgment, etc.

Garland, for Defendant.

⁹ The plaintiff as to the plea of the defendant firstly above pleaded and whereof he had put himself on the country, doth do like.

Field.

And the plaintiff as to the plea of the defendant secondly above pleaded as to the said several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, says that the plaintiff by reason of anything in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant, because he says that said defendant at said time when, etc., of his own wrong and without the cause by him in his said second plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the plaintiff has above in his declaration complained. And this the plaintiff prays may be inquired of by the country, etc.

Field.

And the plaintiff as to the plea of the defendant thirdly above pleaded as to several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, says that the plaintiff by reason of anything in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant, because he says that said defendant at said time, when, etc., of his own wrong and without the cause by him in his said third plea alleged, committed the said several trespasses in the introductory part of that plea mentioned in manner and form as the plaintiff has above in his declaration complained. And this the plaintiff prays may be inquired of by the country, etc.

Field.

The *Counsel* thereupon filed the following agreed statement of facts, viz. :

In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi River, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old,¹⁰ and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defend-

¹⁰ In the plaintiff's pamphlet there is this note: "There is an actual though unimportant error here. This daughter is 16 years old and was born just before the master took the family across that magic line that transmutes persons into things."

ant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to the Circuit Court, where it has been continued to await the decision of this case.

June 17.

The case came on for trial today.

*R. M. Field*¹¹ and *Arba N. Crane*¹² for plaintiff.

*H. A. Garland*¹³ for defendant.

The following jurors were selected and sworn: James A. Hardy, Thomas McKenney, John Atkinson, Peter L. Dowling, Samuel Woods, James R. Bridges, R. N. Lock, James A. Scott, John Martin, George Holtzirene, George Berg and Martin Hake.

Mr. Field read to the jury the agreed statement of facts and no further evidence was submitted to the jury on either side.

Mr. Field asked the court to give the following instructions:

“That upon the facts agreed to by the parties, they ought to find for the plaintiff.”

The COURT refused to give such instructions to the jury.

Mr. Field excepted.

¹¹ See 2 Am. St. Tr. 207.

¹² CRANE, ARBA NELSON (1834-1904.) Born Walcott, Vt.; son of Porter Crane and Sarah Parkhurst Nelson. His ancestors were Benjamin Crane, who came from England and settled in Weathersfield, Conn., prior to 1658, and Thomas Nelson, who came from Yorkshire, Eng., and settled in Mass. in 1638. Attended Albany Law School and graduated Harvard Law School, 1856; removed that year to St. Louis, was admitted to Bar and entered office of R. M. Field; partner of Chester Harding, 1866-75; director St. Louis Law Library Assn., 1868-81; President, 1881-1904; compiled Catalogue St. Louis Law Library, 1895. Though not one of the founders of the St. Louis Law Library Assn., for he came to that city after its foundation, yet he may be justly styled the creator of the St. Louis Law Library—one of the largest and most complete law libraries in the land.

¹³ See *ante*, p. 227.

The COURT then gave the following instruction on motion of *Mr. Garland*.

"The jury are instructed, that upon the facts in this case, the law is with the defendant."

The *jury* returned the following verdict:

As to the first issue, not guilty. As to the second issue, that the plaintiff was a negro slave and the property of the defendant. As to the third issue, that Harriet, his wife, and Eliza and Lizzie, his daughters, were negro slaves and the property of the defendant.

The COURT, therefore, gave judgment for the defendant with costs.

On May 15, 1854, an appeal was taken to the Supreme Court of the United States. The case was twice argued, the counsel for the appellants being George T. Curtis¹⁴ of Boston, and Montgomery Blair¹⁵ of Washington and for the appellees, Henry S. Geyer¹⁶ of St. Louis and Reverdy Johnson¹⁷ of Maryland. On March 6, 1857, the decision was rendered against Dred Scott¹⁸. Chief Justice Taney¹⁹ delivered the opinion of the Court but all the other judges wrote separate opinions. Two judges, Curtis²⁰ and McLean²¹, dissented.

¹⁴ CURTIS, GEORGE TICKNOR. (1812-1894.) Born Watertown, Mass.; younger brother of Mr. Justice Curtis of the U. S. Supreme Court; Grad. Harvard, 1832. Admitted to Bar first in Mass. Member Mass. Legislature and U. S. Commr., Boston. Removed to New York City where he became a leader at the Bar. Author of a number of legal and literary works.

¹⁵ BLAIR, MONTGOMERY (1813-1883.) Born Franklin Co., Ky. Graduated West Point, 1835; resigned from the army and admitted to Bar, 1839; Mayor (St. Louis) 1842 and Judge Court of Common Pleas, 1843-1849; removed to Maryland, 1852; U. S. Solicitor, Court of Claims, 1855; Postmaster General, 1861-64; Died at Silver Springs, Md.

¹⁶ See 2 Am. St. Tr. 206.

¹⁷ See 8 Am. St. Tr. 42.

¹⁸ Howard's (U. S.) Reports 393.

¹⁹ See 1 Am. St. Tr. 69.

²⁰ CURTIS, BENJAMIN ROBBINS (1809-1874.) Born Watertown, Mass. Graduated Harvard, 1829; admitted to Bar, 1832; Associate Justice U. S. Supreme Court, 1851-57; returned to practice in Boston, 1857; Counsel for President Johnson on his Impeachment, 1868; Editor U. S. Reports, 1851-56. Died at Newport, R. I.

²¹ McLEAN, JOHN (1785-1861.) Born Morris Co., N. J. Removed to Cincinnati and admitted to Ohio Bar, 1807; member of Congress,

In a note to the Greeley edition of the Dred Scott Judgment (*ante*, p. 245), there is an interesting analysis of the points ruled upon by the nine justices in their written opinions. It is as follows:

Seven Judges (McLean and Curtis dissenting) ruled that the record showed on the part of Scott a disability to maintain his suit. Taney, Wayne and Daniel held that the fact set forth in the plea in abatement in the Court below, and admitted in the demurrer, "that the plainaiff was a negro of African descent, whose ancestors were of pure blood, and who were brought into this country and sold as slaves," showed him not to be a citizen of the United States, and therefore disqualified to sue in a United States Court; and that the suit ought, on that ground, to be remanded to be dismissed for want of jurisdiction. Grier and Campbell (making with the other three a majority of the Court) concurred in this remanding for dismissal, and such was the judgment of the Court. Both Grier and Campbell based themselves, however, not on the plea in abatement, but on the fact apparent, as they thought, in the agreed statement of facts which made a part of the record, that Scott was a slave, and on that ground disqualified to sue, and they both seemed to think that the more regular course would be to confirm the judgment of the court below. Such a confirmation of the judgment below Nelson and Catron held to be the only proper course, thus siding, so far as the question of jurisdiction was concerned, with Curtis and McLean, while even Grier (making up, with the other four, a majority of the Court) went so far as to admit that the record showed a *prima facie* case of jurisdiction.

McLean and Catron held that as there was no appeal from the judgment of the Circuit Court on the plea in abatement, the question of jurisdiction was not before the Court. Taney, Wayne, Daniel and Curtis held, *per contra*, that, as the courts of the United States were of limited jurisdiction, the question of jurisdiction was always in order. Grier, Nelson and Campbell were silent on this point.

Three Judges—Taney, Wayne and Daniel—held that, although the Court below had no jurisdiction, and the case must be dismissed on that ground, it was still competent for the Supreme Court to give an opinion on the merits of the case, and on all the questions therein involved. McLean and Curtis dissented from this view. In their opinion, any doctrines laid down under such circumstances must be regarded as extra-judicial. They based their right of going into the merits on the assumption that the court below had jurisdiction, a view in which they were sustained by Catron and Grier. Nelson and Campbell, as they had avoided any expression of opinion on the question of jurisdiction, did the same on this point of judicial propriety; but Nelson, by confining himself, in his opinion, to the single point of the revival of Scott's condition of

1812-16; Judge Supreme Court Ohio, 1816-22; Commr. General Land Office, 1822; Postmaster General, 1823-29; Associate Justice U. S. Supreme Court, 1829-61. Died at Cincinnati.

slavery by his return to Missouri, seemed to concur in the view of judicial propriety taken by McLean and Curtis.

Three Judges—Taney, Wayne and Daniel—held that a negro of African descent was incapable of being a citizen of the United States or even of suing as such in a Federal Court. From this doctrine McLean and Curtis expressly dissented, while Nelson, Grier, Campbell and Catron avoided any expression of opinion upon it.

Taney, Wayne, Daniel and Campbell held that the Constitution conferred no power on Congress to legislate for the Territories, the power to make all needful rules and regulations being confined solely to the disposition of the lands as property, and even that authority being limited to the Territories belonging to the United States (*i. e.*, the Territory northwest of the Ohio) when the Constitution was made. They, however, seemed to admit a certain power of legislation in Congress, based on the fact of acquisition, and growing out of the necessity of the case. McLean, Catron, and Curtis held, on the other hand, that under the authority to make needful rules and regulations, as well as by the necessity of the case, Congress had a full power of legislation for the Territories, limited only by the general restraints upon its legislative powers contained in the Constitution. Nelson expressed no opinion on this point; nor did Grier, except the implication in favor of the first view from his joining in pronouncing the Missouri prohibition of 1820 unconstitutional, though on what particular ground he held it to be so does not appear.

Taney, Wayne, and Daniel held that the Ordinance of 1787, though good and binding under the Confederation, expired with the Confederation, and that the act of Congress passed to confirm it was void, because Congress had no power to legislate for the Territories. McLean, Catron, and Curtis held *per contra*, that the re-enactment of the Ordinance of 1787 was a valid exercise of the power of Congress; while Campbell admitted—and in this Catron concurred with him (Daniel *contra*, the others silent)—that the Ordinance of 1787, having been agreed to by Virginia, became thereby a part of the compact of cession permanently binding on the parties, and was so regarded by the Convention that framed the Constitution.

Five Judges, a majority of the Court—Taney, Wayne, Daniel, Campbell and Grier—held that the Missouri prohibition of 1820 was unconstitutional and void; while Catron argued that it was void, because it conflicted with the French treaty for the cession of Louisiana. McLean and Curtis held the prohibition constitutional and valid. Nelson silent.

Five Judges—Taney, Wayne, Daniel, Campbell and Catron—a majority of the Court, held that slaves were property in a general sense, as much so as cattle, or at least were so recognized by the Constitution of the United States; and as such might be carried into the Territories, notwithstanding any Congressional prohibition. McLean and Curtis held *per contra*, that slaves are recognized property only locally and by the laws of particular States, being out of

these States not property, nor even slaves, except in the single case of fugitives. Grier and Nelson silent.

Six Judges—Taney, Wayne, Daniel, Campbell, Catron and Nelson—held that whatever claim to freedom Scott might have had (if any, which most of them denied), he lost it by his return to Missouri. This opinion, on the part of Taney, Wayne and Daniel, was based solely on the law of Missouri, as recently laid down by the Supreme Court of that State. Nelson and Catron based it on what they thought the prevailing current of legal decision on the subject; and Campbell on the fact that no sufficient domicile either in slave or master, appeared either in Illinois or Minnesota. McLean and Curtis held, *per contra*, that Scott had been made free by his residence in Illinois and Minnesota, and that the rules of international law respecting the emancipation of slaves by residence were a part of the law of Missouri, which law had been improperly departed from and set at naught by the Missouri decision in the plaintiff's case; and that on questions depending not on any statute or local usage but on principles of universal jurisprudence, the decisions of State Courts are not conclusive on the United States Courts as to the laws of the States.

Seven Judges (McLean and Curtis dissenting) held, that by the facts on the record, it appeared that Scott was a slave, notwithstanding his residence in Illinois and Minnesota.

It appears from this analysis, that only the following points commanded a majority of votes:

1. That Scott was a slave, notwithstanding his residence in Illinois and Minnesota. Seven Judges to two.
2. That the Missouri prohibition of 1820 was unconstitutional and void. Five Judges against two; one silent, and one holding it void, but not unconstitutional.
3. That, under the Constitution of the United States, slaves are as much property as horses. Five Judges, all slaveholders, against two non-slaveholders, the two other non-slaveholders silent.

THE TRIAL OF DR. THOMAS THATCHER GRAVES FOR THE MURDER OF JOSEPHINE A. BARNABY. DENVER, COLORADO, 1891.

THE NARRATIVE.

Mrs. Josephine A. Barnaby,¹ a wealthy widow whose home was in Providence, R. I., had been spending the winter of 1890 at the California health resorts in company with a friend, Mrs. Edward S. Worrell, of Denver. They separated about the first of April, 1891, it being understood that they were to meet in Denver, where Mrs. Worrell was visiting her son. Mrs. Barnaby arrived in Denver April 9th, and joined her friend, who informed her that a package had arrived by mail addressed to her and was waiting for her at the office of her son. The next morning Mrs. Barnaby went to the office to get the package, accompanied by Mrs. Worrell. It was

¹ Mrs. Barnaby's maiden name was Reynolds and she was married to Jerothumel B. Barnaby in the city of Providence in the fall of 1857. They had three children, Mabel, Hattie and Maud. Mr. Barnaby was one of the representative merchants of the city and he had established branch houses in several of the principal cities in New England and the West. He became a prominent and influential factor in Rhode Island politics. He ran for governor and Congress on the Democratic ticket, and though defeated, was one of the most influential of the Democrats of the State. He was known at Washington as a level-headed, clear-sighted man. He was a member of the Democratic National Committee for Rhode Island at a time when the man occupying that position was the only representative of the party in national affairs for this state. His wealth enabled him to sustain this position with distinction and his sumptuous habits of life made him a notable person wherever he and his family went. In the year 1879 Hattie, the second daughter, died, and in 1884 Mabel married John H. Conrad, a wealthy Western ranchman, mine owner and politician. In September, 1889, Mr. Barnaby died, leaving an estate of \$1,700,000. Under the will Mrs. Barnaby was to have \$2,500 a year for her life while the bulk of the property went to their daughters, including the family mansion devised to Maud, then in her 19th year, and who was at the time of her mother's death, in Europe.

opened there and proved to be a box with a sliding wooden top, with no mark upon it except a Liebig's extract label. Inside was a bottle wrapped in white paper with a piece of paper pasted on the side and written thereon were these words:

Wish you a happy New Year. Please accept this fine old Whiskey from your friends in the woods.

Mrs. Barnaby, when she read the inscription, said: "It must be from Bennett." The box the next day was carried to the Worrell residence and taken by Mrs. Barnaby to her room. Two days later the two ladies, after returning somewhat fatigued from a long drive in the country, indulged in a "toddy," which Mrs. Barnaby prepared from the alleged whiskey in the bottle from the woods. They both noticed its bitter taste and in a few minutes were seized with pains, nausea and intense thirst. Physicians were summoned but, after lingering nearly unconscious for a week, Mrs. Barnaby died. In her conscious moments she declared that she had been poisoned and was positive that her friends, the Bennetts, had not sent it and once she exclaimed: "I wonder if it can be possible that Dr. Graves could do such a thing."

Before her husband's death in 1889, Mrs. Barnaby had been an invalid, suffering from paralysis, had traveled much in search of relief and had consulted leading physicians and specialists in this country and abroad. The family mansion of the Barnabys in Providence was a short distance from the office of Dr. T. Thatcher Graves² and it happened that an

² GRAVES, THOMAS THATCHER. (1841-1893.) Born Norwich, Conn.; educated in the academy at East Thompson, where he met Daniel R. Ballou, who was afterwards to take part in the most vital events of the tragedy in store for him. He entered the dental branch of the medical school at Harvard College, graduating in 1871 and after practising in Lynn, Mass., removed to Danielsonville, Conn., married there and practised dentistry and certain branches of medicine for ten years. Before moving to Providence, Dr. Graves spent one or more winters in Florida, about 1883-4. He returned with a patent medicine which he advertised all over Connecticut. In 1886 he established an office in Providence and began to advertise his specialties. He distributed printed circulars and

old family servant of the Barnaby's, Mrs. Hickey, was working for Mrs. Graves, when one afternoon Mrs. Barnaby called at the Graves house to see her. She introduced Mrs. Barnaby to the physician who told her that her affliction was one of his specialties, and that he thought he could cure her. The result of this chance meeting was his engagement to treat her for her mental and physical ailments. Dr. Graves soon obtained the entire confidence of his patient. A little later, when her husband died leaving her a small annuity instead of her share of his large estate, he induced the widow to employ his friend Ballou, a lawyer, to bring an action to set aside the will, and when a compromise was entered into with the heirs under which the sum of \$120,000 was to be paid to Mrs. Barnaby, he induced her to make him her trustee and agent, under which agreement the money was turned over to him, less a fat fee which he agreed that Mr. Ballou should have and of which he personally took a part. He induced her likewise to make a will which was drawn up by his lawyer, appointing him executor of her estate without bond, giving him a large legacy and a power of attorney to take complete control of her business affairs. From that time on Mrs. Barnaby became Dr. Graves' slave, receiving only such money as he chose to let her have, directing where she should live and what she should do, and placing with her a female attendant who was practically a spy and who reported all the widow's actions to the physician. In the summer of 1890 Mrs. Barnaby went to the Adirondacks accompanied by Sallie Hanley, the spy, and boarded at the hotel of Ed-

mailed medicine in wooden boxes. He had previously practised in all the schools, allopathic, homeopathic, eclectic, etc., but finally announced himself as a specialist in nervous diseases, claiming a practice of \$5,000 a year. He was a man of fine presence, tall, robust, and dignified, with Burnside whiskers and winning address and professing to have traveled in Europe and the Orient, he obtained a recognition in society and had a large circle of professional and society acquaintances. He became prominently identified with the Grand Army of the Republic and was at one time elected to the office of medical director of the Rhode Island department, and occasionally delivered lectures for the benefit of local charitable organizations.

ward Bennett, an expert and experienced guide in that region, whom she employed to attend her in her rambles and boating excursions. Sallie Hanley having reported to Dr. Graves that Mrs. Barnaby was thinking of buying a cottage in the mountains from Mr. Bennett, he wrote her that if she did so he would have a guardian appointed for her, after which she could not sign a paper, could not borrow money, could not have anything charged to her any more than a six-year-old child, could not put her foot again in the Adirondacks but would have to stay in town and in her old home. This caused Mrs. Barnaby great distress.

In the fall of 1890 she visited Mrs. Worrell at her home in Chester, Pa., told her of her troubles and exclaimed that Dr. Graves "would be the ruin of her yet." On another visit she declared her intention to make another will, sent to Dr. Graves for the first instrument announcing her intention to change it, but he would not comply with her request. At the suggestion of the Worrells a second will was executed in which she reduced his legacy and remembered the Worrells and the Bennetts.

A *post-mortem* examination disclosed that Mrs. Barnaby had died of arsenical poisoning and an analysis of the bottle showed that it contained a solution of arsenic, enough to kill many persons. Dr. Graves was notified by wire of her illness and death, but he reached Denver by a circuitous route, stopping on the way to visit some of his relatives. When he arrived he did not ask to see the body, seemed very much excited and avoided the members of the family who had been summoned to the city. He accompanied the funeral party that took the remains back to Providence but left it at Jersey City. The fact that Mrs. Barnaby had been poisoned had been published widely in the newspapers, and in an interview with reporters on the evening of his return home he attacked the character of Mrs. Barnaby in a most foul manner and also alleged that the bottle must have been sent by the Bennetts. The next day there arrived in Providence Mrs. Barnaby's son-in-law, John N. Conrad, a man of wealth and

position in the West, who had become convinced that Dr. Graves was the murderer and who determined to investigate the matter at any cost. The Pinkerton detectives were employed and it was soon discovered that while the deadly package had been mailed in Boston, the stamps upon it were not on sale at that time in that city but were in Providence, where Dr. Graves was in the habit of mailing packages of medicine and purchasing quantities of stamps of that particular issue; also that the doctor was in Boston during the week when the package was mailed to Denver. It was also ascertained that he was behind very seriously in his financial accounting to Mrs. Barnaby's estate. Mr. Conrad at once called upon the doctor, and, treating him as one who was equally interested in finding the real criminal, he gained his confidence and induced him on several nights in succession to go over to the Barnaby mansion and talk over the matter, introducing him there on each occasion to a Pinkerton detective as his brother. He persuaded him by promising to publish a public statement that his accounts were all right, to turn over all of Mrs. Barnaby's securities to a trustee appointed by the court, and by dint of skillful persuasion and promises that his confession would not be used in a court of justice, the doctor finally admitted that he had sent a bottle of pure whiskey to Mrs. Barnaby, and insinuated that the Worrells must have mixed the poison with it after it reached the office or residence of young Mr. Worrell. He could not be induced to make the confession to other parties, or make a public statement, because he said he had told every one, including his wife, that he had not sent any bottle to Mrs. Barnaby at that time.

The next movement was to secure his presence in Denver, as his admissions to Mr. Conrad were telegraphed to the district attorney the same night. The authorities there devised a plan to induce him to go within the Colorado jurisdiction. Information was transmitted that the Worrells were suspected and Dr. Graves wired the district attorney his willingness to appear before the grand jury. He was

notified to come at once, but at the same time the Worrells and Conrads received a similar notification. The doctor jumped at the chance of incriminating the Worrells by testimony calculated to exculpate himself and started for Denver on May 9th, being accompanied the whole way, unknown to him, by Pinkerton detectives.

On May 18th the grand jury returned an indictment charging him with the murder of Mrs. Barnaby. The trial began on November 24th and lasted four weeks. The facts just outlined and many others were proved by witnesses. Medical men declared the contents of the bottle to be a preparation of arsenic of a most deadly character and one not to be purchased ordinarily at a drug store but requiring preparation by a person acquainted with toxicology and chemistry. Experts also gave their opinion that the address on the package and the New Year's greeting on the bottle were in the handwriting of the accused.³ The jury, after a short consultation, brought in a verdict of guilty and he was sentenced to be hanged.

The Supreme Court reversed the conviction and ordered a new trial on account of an incorrect instruction of the trial judge, but before it could take place, Dr. Graves defeated his prosecutors by committing suicide in his cell in the Denver jail.

THE TRIAL.⁴

In the District Court of Arapahoe County, Denver, Colorado, December, 1891.

HON. AMOS J. RISING,⁵ Judge.

November 24.

The prisoner, *Thomas Thatcher Graves*, having been previously indicted for the murder of Mrs. Josephine A. Bar-

³ Which was afterwards discovered to be erroneous; see *post*, p. 448.

⁴ *Bibliography.* **"Death in the Mail. A narrative of the Murder of a Wealthy Widow and the Trial and Conviction of the Assassin, Who was Her Physician, Attorney and Friendly Adviser. By Martin C. Day. Providence. The Providence Journal Print, 1892."*

**"The Case of Dr. Graves."* This is an octavo pamphlet of 215

naby by poison, was arraigned today and pleaded *not guilty*. The selection of the jury began.

Isaac N. Stevens,⁶ District Attorney; *James R. Belford*,⁷ and *Lafe Pence*⁸ for the State .

Henry M. Furman,⁹ *Thomas Macon*,¹⁰ and *Daniel R. Bal-lou*,¹¹ for the Prisoner.

pages, issued by the *Denver Times*. It contains the evidence on the trial practically in full and the opening speeches of the counsel, but not the instructions of the court or the closing addresses to the jury.

⁵ **RISING, AMOS J.** (1829-1917.) Born Warren, Vt.; Supt. of Schools, Warren, 1851; Supt of Schools, Poestenkill, N. Y., 1855; admitted to Bar, 1855; removed to Dodge Co., Wis., 1857; Pros. Atty., Horricon, 1859-1862; Dist. Atty., Dodge Co., 1860-1870; removed to Michigan, 1873; Dist. Atty., Ontonogon Co., 1876; removed to Silver Cliff, Colo., 1880; State Senator, 1882; removed to Denver, 1886; Supreme Court Commr., 1887-1889; Dist. Judge, Second Judicial Circuit, 1889; removed to Scotia, N. Y., 1915, where he died. See *Rocky Mountain Sentinel*, Nov. 10, 1917.

⁶ **STEVENS, ISAAC NEWTON.** (1858-1920.) Born Newton, O. Began practice Denver, 1880; Asst. U. S. Atty., 1883-85; (State) Dist. Atty., 1888-92; owner Colorado Springs Gazette, 1900-03; editor and proprietor Pueblo Chieftain, 1903-11 chairman Republican City Committee, Denver, six years; Secy. Republican State Committee, two years; City Atty., Denver, 1913-15; President Commonwealth Casualty Co., Philadelphia, 1915-19. One of the introducers of the sugar beet industry into Colorado.

⁷ **BELFORD, JAMES BURNS.** (1837-1910.) Born Lewiston, Pa.; educated Dickinson College, Pa.; admitted to Bar, 1859, and began practice in Moniteau, Mo.; removed to Indiana, 1861; elector on Lincoln presidential ticket, 1864; during Civil War was engaged in enrollment and transportation of troops; member lower house of Indiana Legislature, 1866-68; Associate Justice, Supreme Court of Colorado, 1870-1875; elected to Congress, 1876, upon admission of Colorado as a state, and served until 1885, with exception of one session. Died in Denver. See *Representative Men of Colorado*, 1902; *Biog. Congress Direct.* Byers Encyc. Biog., Colo., 1901.

⁸ **PENCE, LAFE.** Born Columbus, Ind. (1857.) Graduated Han-over Coll., Ind., 1877; admitted to Bar, 1878; moved to Winfield, Kans., 1879, and to Rico, Colo., 1881; member Colo. Legislature, 1884; removed to Denver, 1885; County Atty., Arapahoe Co., 1887-88; member 53rd Congress 1893-95. Later was interested in rail-roading in New York; returned to Denver and subsequently went to San Francisco and resumed law practice. See *Biog. Congress Direct.* 1774-1911 (1913).

⁹ **FURMAN, HENRY MARSHALL.** (1850-1916.) Born Society Hill,

December 4.

The empanelment of the jury, which occupied ten days, was completed today. The following jurors were sworn: M. L. Sterling, hardware; Robert Adair, liquor dealer; John M. Boring, contractor; J. P. Lower, gunsmith (foreman); Edward Grace, hotelkeeper; David Linhart, farmer; T. J. Carpenter, cabinetmaker; Patrick Riordan, miller; G. E. Overton, real estate; Henry Preston, timekeeper; Wilson Perrin, retired; John J. Peters, cabinetmaker.

MR. STEVENS' OPENING ADDRESS.

Mr. Stevens. May it please your honor, and you, gentlemen, who have been selected as jurors in this case, the crime which is the subject of inquiry in this trial has no precedent or parallel in the history of the world. It is unique, original, cowardly, dastardly and infamous. It would have struck

S. C.; educated at Sumpter and Greenville, S. C.; removed to New Orleans and studied law with Judge Whitaker; admitted to Texas Bar; practised law at Comanche, Bolton and Ft. Worth, Tex., 1874-1890; removed to Denver, Colo. in the latter year and practiced there until 1893, when he returned to Ft. Worth, going to Oklahoma (then the Indian Territory) in 1895; Judge Okla. Criminal Court of Appeals, 1908-1916. Was a 32nd degree Mason and Master of the Grand Lodge of Ind. Ter., 1901.

¹⁰ MACON, THOMAS. (1830-1908.) Born Christian Co., Ky.; moved when a boy to Bloomington, Ill., where he was admitted to Bar (1855); practiced law for several years in Oskaloosa, Ia.; went to Canon City, Colo., 1863; member Territorial Legislature (Fremont Co.), 1867-68; Comr. Supreme Court of Colo., 1887-88; practiced law in Denver; member of firm of Wells, Macon & Furman. Died in Denver. See Baskin, Hist. of Denver, Colo., 1880; The Trail, a magazine for Colorado, June, 1908.

¹¹ BALLOU, DANIEL ROSS. Born Smithfield, R. I., 1837. Student Brown University, 1863; served as private and lieutenant, 12th Reg. R. I. Inf., 1862-63; commissioned colonel of militia after his return from service; admitted to R. I. Bar, 1864; Clerk Court of Common Pleas, 1867-75; member R. I. House of Rep., 1865-67; 1882-84; 1885-86; U. S. Marshall Dist. R. I., 1913; Chairman R. I. Board of bar examiners; member Loyal Legion, G. A. R. (Dep. Commander, 1895). See Who's Who in New England, 1916; Hist. Cat. of Brown Univ.; Williams & Blanding, Men of Progress in R. I., 1896,

terror into the heart of the most reckless criminals during the decline of the Roman Empire, when poison was most artfully administered with a splendid daring of indifference. It puts to shame the accomplished efforts of the ancient Egyptians. It has been left for the splendid advancement of civilization for the utilization of the means by which that advance has been made to furnish to the world a more nefarious, a more absolutely reckless crime of murder by poison than any ever before dreamed of. The mails of the National Government carry destruction and death. The artery through which flows a great commercial and social life carries insidious and deadly poison along with a billet doux; side by side with the greeting of friends comes the message of death. To ascertain and to punish the perpetrator of this heinous deed is the sole purpose of this investigation. The State has no duty to perform except to discover the truth and to punish the guilty. It has no vengeance to wreak, no private end to gain. It is the community, organized, law-abiding and law-loving, orderly, patriotic, devoted to the laws and institutions, which make it happy and prosperous and great, maintaining its life, its liberty and its happiness against the stealthy hand of the assassin and the violator of its sacred rights. It is the home and the children, the maidens, the wives, the youth and the men fighting for their lives, their existence and their safety. It is organized civilization against the enemy of mankind.

I trust, gentlemen, that, in whatever I may say pending this trial, not one syllable may be uttered which shall not be substantiated by facts. I trust that no spirit will animate any word or act of mine save and except that of upholding the laws of the State, and of impartially enforcing their mandates. I hope, gentlemen, that not a lisp will escape my lips which is not becoming the rights, the dignity and the power of this great community, which is now seeking redress for this crime, and protection for its safety in the future from the commission of such crimes. It may be that there exists an unwritten right which justifies and crowns with glory the

members of our profession who turn criminals loose upon a peaceable and orderly community, but I take it our civilization has long since passed by such days. I am certain that no right exists on the part of a public prosecutor except that of protecting the innocent, and to the extent of his ability to see that proper justice is meted out to the guilty.

The defendant came from Danielsonville, Conn., to the city of Providence some four or five years ago. He had lived in Danielsonville for a number of years. His practice in the city of Providence was not very extensive nor very lucrative. He undertook certain specialties, though he was not at that time, and I believe is not yet, a member of the State Medical Society of Rhode Island. He prepared in the line of his profession certain compounds of medicine, which he was in the habit of sending to various sections of the country by mail or express to patients which he might have. Sometime in the year 1888 Mrs. Barnaby called at the house of Mrs. Hickey, a former favorite domestic, and was informed that she was at the house of Dr. T. Thatcher Graves, doing some work for Dr. Graves. Mrs. Barnaby proceeded there in her carriage and inquired for Mrs. Hickey. She was shown into the room where Mrs. Hickey was at work, and while she was thus visiting, Dr. Graves came into the room and was introduced by Mrs. Hickey to Mrs. Barnaby. Very early in the doctor's conversation with Mrs. Barnaby, he remarked that her affliction (paralysis), was one of his specialties, and that he thought under his treatment he might be able to cure her. Mrs. Barnaby, of course, like all invalids, was willing to accept of any possibility of a relief or cure which might be promised, and Dr. Graves from that time on prescribed at intervals for her malady. He was most assiduous in his attentions to her, and no doubt she was in every way, from a profitable standpoint, an excellent patient. He, too, succeeded in working himself into her good will and good graces, through his attentions as a physician, and through his profession of disinterested friendship for the woman herself.

About this time the father and mother of Mrs. Barnaby

died in Providence, and left her improved real property of the value of \$30,000, and about \$4,000 in cash, and from which there was derived a fair income. In October, 1889, Mr. Barnaby, after an illness extending over a considerable period of time, died, and in his will he provided that the sum of \$2,500 a year should be paid to his widow during her lifetime. Knowing well, and as subsequent events have shown better than anybody, the business capacity of the widow, he provided for her wants without leaving her money which he knew she was utterly incapable of managing for herself. That sum, with the income which she had from the property left her by her parents, constituted her revenue.

Very shortly after Mr. Barnaby's death, acting under the advice of the defendant and perhaps of others, Mrs. Barnaby was induced to enter proceedings for a contest of her husband's will, and Dr. Graves secured for her in this matter the services of his own counsel, Col. Ballou. No sooner were such proceedings instituted than her daughters, without waiting for the action of the court therein, voluntarily gave half of the cash allowance which had been given to them under the provisions of the will, and the trustees of the estate added thereto, so that the total amount to be received by Mrs. Barnaby was \$105,000 within a few days, I believe during the same week that this matter was settled. A will was prepared by Col. Ballou for Mrs. Barnaby, in which will she gave to her new-made friend, Dr. T. Thatcher Graves, the sum of \$25,000, and provided in the will that he should be the sole executor thereof, without bonds. Shortly after the first payment on account of this \$105,000 by the trustees of the Barnaby estate, namely, the sum of \$15,000, was paid over to Dr. Graves, who had so ingratiated himself into the good wishes and confidence of Mrs. Barnaby, that she had made him sole agent to manage all of her affairs, and had given him full power of attorney, giving him absolute control over all of her money and property. As soon as this money was paid to Dr. Graves he paid his friend and lawyer, Col. Ballou, for his services in securing this settlement for

Mrs. Barnaby out of said \$15,000, the sum of \$10,600, \$600, I believe, to cover the costs of the action in court, so that there was left to the care and management of this trusted agent and physician the sum of \$4400.

This sum the doctor, acting as agent, proceeded to manage and care for until some time during the summer another payment of \$5000 was made, and the following fall another \$5000 was paid by the trustees, leaving a balance unpaid of \$80,000. The trustees had power to pay this money on or before 18 months from the time the decree was entered by the court, with the provision that if not paid at the expiration of the 18 months, the sum should draw the legal rate of interest. The final \$80,000 was paid by the trustees of the Barnaby estate to Dr. Graves, as Mrs. Barnaby's agent, on the 21st day of March, 1891, at the expiration of 18 months. Mrs. Barnaby never knew this payment had been made. This payment was made just nine days before the package containing the bottle of poison was mailed at the Post Office in Boston.

But I must not anticipate the acts in the case, but will relate them as nearly as possible in chronological order. Mrs. Barnaby was much away from Providence during the entire period from the death of her husband until her own death. It seemed to be the policy and design of her agent and physician to keep her away as much as possible. She was in Florida during the winter, and in the Adirondack Mountains during the summer of 1890. She had been in the habit of going to the Adirondack Mountains for many years. It was the custom of herself and her husband during his lifetime to visit that region almost yearly during the summer months. They always stopped at the hotel conducted by Mr. and Mrs. Edward Bennett, for whom they had formed a strong attachment, and who were great friends to the Barnaby family. Mr. Bennett was regarded as one of the most efficient guides in that whole region, and travelers who desired to see the magnificent scenery, or desired to hunt for the game in which these mountains abounded, were always glad to have Mr. Bennett as their guide.

Some time during the month of June, 1890, Mrs. Barnaby betook herself to the Adirondack Mountains and to the home of the Bennetts, accompanied by a maid recommended and urged upon her by Dr. Graves, Miss Sallie Hanley. Being a woman who never could do too much to those who showed her kindly attentions, and who might insinuate themselves into her confidence and friendship, she extended an invitation to Dr. and Mrs. Graves to spend the summer with her in the Adirondacks, and to be her guests, entirely at her own expense. This invitation was accepted and during the month of August and a part of September of that year, Dr. and Mrs. Graves were the guests of Mrs. Barnaby at the home of the Bennetts in the Adirondack Mountains.

On their return to the city of Providence they wrote Mrs. Barnaby most grateful and appreciative letters with reference to their trip and their stay in the mountains and praised most highly the enjoyment and pleasure which it had afforded them, and were most complimentary in all their references to Mrs. Barnaby and to the circumstances and events of their trip. It was during this visit to Mrs. Barnaby in the Adirondacks and after the return to Providence of Dr. Graves and his wife that Mrs. Barnaby expressed the desire to purchase a summer house near the Bennetts in the Adirondacks, and otherwise expressed some friendship in their behalf.

These facts were communicated to Dr. Graves both directly by Mrs. Barnaby and through the channel of her maid, Miss Hanley, and he immediately notified Mrs. Barnaby that if his will and his wishes were not followed in every particular, he would have a guardian appointed for her, and proceeded to explain that a guardian meant that she could never set foot out of her house without his permission, and that she would be entirely subservient to whatever he might desire in the smallest particular, and that she would be nothing more than a child under his control.

This letter almost broke Mrs. Barnaby's heart and she cried night and day about it at intervals for a long time. She forwarded the letter to Col. Ballou of Providence, asking his

protection and advice. From that time on, Mrs. Barnaby expressed considerable feeling and dissatisfaction with reference to her agent and physician and his acts regarding herself, and her property, and upon her return to Providence in the winter of 1890 she was very free in her talk with Mrs. Hickey and others about taking all of her property from the control of Dr. Graves, and said that it was her intention the next spring upon her return from California, to divest him of any power or control over her affairs, all of which Dr. Graves well knew at the time.

Mrs. Barnaby, in December, 1890, went to visit friends whom she had known for 15 years, and at whose house she and her husband had often visited, Mr. and Mrs. E. S. Worrell of Chester, Pa. Mrs. Barnaby and the Worrells had become acquainted 15 years before, when both were making a tour on the Continent of Europe, and their friendship grew and strengthened during all of these years. Upon leaving Providence, Mrs. Barnaby somewhat abruptly and without consulting either Dr. Graves or Miss Hanley, left Miss Hanley in the city of Providence and proceeded to Chester without her. Along with her feelings of distrust with reference to Dr. Graves she had also become distrustful of the maid who had been furnished her by the doctor.

As the result of such movement she incurred the displeasure of that young lady. The dissatisfaction which she felt over the somewhat dictatorial manner in which Dr. Graves assumed to manage her affairs grew upon her, and while in Chester, Pa., she had Mr. Worrell write a letter to Dr. Graves, requesting a return of the will which she had made and which was in his possession. He answered that it was not accessible, being in the safety deposit vaults in Boston, but that he would secure it at some future time and forward it to her in California, where she was intending to go with Mrs. Worrell.

In the month of January, 1891, Mrs. Barnaby and Mrs. Worrell left Chester, Pa., for the West, and bound for California. They arrived in Denver and stopped over for a few

days to visit Mrs. Worrell's son, E. S. Worrell, Jr., who had recently been married to Miss Carrier, of this city. While Mrs. Barnaby was visiting in Denver this time she received a package of medicine from Dr. Graves, sent to her in the care of Mr. Worrell. This medicine was "for her rheumatism and memory," as the doctor graphically described it. From Denver the two ladies proceeded to California, and there remained until the latter part of March, when Mrs. Worrell started for Denver, the intention being for Mrs. Barnaby also to accompany her, but Mrs. Barnaby, meeting some lady friends in San Francisco, and being encouraged to take some sort of massage treatment there for paralysis, desired to remain a few days longer, and Mrs. Worrell came alone to the city of Denver, arriving here about the first day of April. Mrs. Barnaby followed her in a few days, arriving in the city of Denver on the ninth day of April.

Shortly before Mrs. Barnaby's arrival in the city of Denver, a package, addressed to Mrs. Barnaby, was received through the Post Office, which said package was stamped, "Merchandise Only," and bore the Boston postmark on its cancelled stamps. The stamps which were on the wrapper of the package were five 15-cent stamps of what is known as the "old issue," and two 10-cent stamps of what is known as the "new issue" of that denomination. This package was sent in the care of Mr. Worrell to his business address, and arrived some five or six days before Mrs. Barnaby reached the city of Denver. She was told that such a package was at Mr. Worrell's office, and being in the office a day or two after her arrival, she opened the package to see what it contained, and took from a box, which was stamped, "Liebig's Beef Extract," a bottle bearing the inscription: "Wish you a happy New Year. Please accept this fine old whiskey from your friends in the woods." She looked at the package and then replaced it in the box, and it was the same evening under her directions taken to Mr. Worrell's house.

The next day the two ladies, in company with Mr. Worrell, visited a ranch belonging to Mr. Worrell, several miles from

the city, and returned in the evening, somewhat fatigued. Mrs. Barnaby and Mrs. Worrell retired to their rooms for some rest, when Mrs. Barnaby suggested that some of the whiskey which her friend had sent her might revive and refresh them, so she took the bottle from her trunk, where it had been previously placed by her down stairs, and obtained hot water and sugar from the servant girl and proceeded to mix what she supposed to be a whiskey toddy. She then carried the glasses up stairs and gave Mrs. Worrell one glass, from which Mrs. Worrell drank, and immediately remarked that it did not have the taste of whiskey at all, and that she thought something must be wrong. Mrs. Barnaby, however, laughingly told her that she thought it was all right and was good whiskey and drank what was in her glass.

Immediately both ladies became violently ill, with vomiting, retching, purging, and all the symptoms which ordinarily attend a person to whom arsenic has been administered. The symptoms continuing for some little time with both of them, medical assistance was sent for, and Dr. Holmes and Dr. Griffith waited upon the ladies and treated them from the beginning for poison by arsenic. Everything possible was done for the relief of both ladies, but Mrs. Barnaby gradually grew worse, until on April 19 she died.

Mrs. Worrell, after a protracted illness, finally recovered from the immediate effects of the draught which she had taken, but bears today, and probably always will bear, the effects of arsenical poisoning in her system. Dr. Bonesteel was called in a few days after the illness, and he also did all in his power for both ladies.

Death is caused from poisoning by arsenic from the utter exhaustion of the organs which sustain life. It is a disease accompanied by the most intense suffering and simply wears the patient to death.

Mrs. Barnaby for six days suffered intensely until at about 2 on the 19th day of April, 1891, she died at the residence of Mr. E. S. Worrell, Jr., on Williams street, in this city. It was thus that this old lady, at the age of 60 years, a paralytic,

at times almost imbecile, a child always in the hands of those who made much of her, in a strange city, met her death. In less than one month from the final payment of \$80,000, which was decreed to her by the court and which was paid to her trusted agent and friend, she had ceased to exist.

There could have been no motive for this infamous crime except one of greed and one of gain. It could not have been possible for any one to have taken the life of this old woman unless it was in a fit of desperation lest he should be deprived of the income which he was already receiving on account of the bequest which he knew at the time she had granted to him. It was a most horrible death, and it was an infinitely more horrible crime. Poisoning is, was, and always has been the weapon of the weak, the cowardly and the treacherous. Its designs are worked out in the dark hours of the night, and its execution accomplished by stealth and deceit. No punishment can be too severe for the perpetrator of such a crime, and this community owes it, not only to itself, but to the balance of the civilized world, to see to it that the perpetrator is meted out the punishment provided by law. There is no place of safety if such crimes are permitted. There could be no place too sacred for the criminal hand of hatred, of greed, or of revenge. The food at the table, whatever is to be partaken of by the inner man, even to the bread and the wine of the Holy Communion of the churches, are liable to be permeated with poisonous substances unless the passion for poisoning is checked by summary punishment.

After having given you, gentlemen, as full an outline as time would permit at this stage of the proceedings, I will now proceed to show you, gentlemen, upon what facts and circumstances we rely for conviction of the commission of this crime by the defendant on trial.

We have no right at this time to say anything with reference to the character of the defendant, nor can we have such right, unless it is attempted on the part of the defense in the case to prove his past good character. During the period of time covered by these trips which I have referred to of Mrs.

Barnaby to the Adirondack Mountains, Dr. Graves well knew that she was dissatisfied with his conduct of her business affairs, and it is a fact which we will establish to your satisfaction that about the time she reached the city of Denver on this last fatal trip it was her intention to take from Dr. Graves all of the property and money in his control. I have already shown you, gentlemen, that he knew that she was dissatisfied in some manner with the will which she had made and which was retained by him, and although I believe she, shortly after having written the letter requesting the will to be sent to her again wrote the doctor that he need not forward it, as she had changed her mind, yet enough was shown by this circumstance, to the doctor's mind at least, as will be shown further on, to indicate to him that she had some dissatisfaction, both with reference to him and the will. It was the intention of Mrs. Barnaby at the time she returned to Denver to invest whatever money she had for investment in this growing city, where she, as every one else, saw the magnificent opportunities for making a vast amount of money. It was her purpose, through Mr. E. S. Worrell, Jr., in whom she had much confidence, both as a man and as a gentleman possessing excellent business qualities, to have her money invested in Denver, where she properly calculated that instead of making two or three per cent per annum which could be derived from her money in New England, that she might double or quadruple her investments within a very few years in this magic city. We will show you, gentlemen, beyond any question, that prior to the time the doctor became Mrs. Barnaby's agent, that his income from his profession amounted to a very insignificant amount, and that it was with great difficulty that he could live within his means. We will show you beyond any doubt that he counted more upon what he could derive from being Mrs. Barnaby's agent and physician than upon the usual skill which 15 or 20 years are presumed to give a man in the practice of the medical profession. To be deprived of the control and custody of her property, to believe that all hope of his ever obtaining any-

thing as a bequest, under some will which she might make on account of her failing confidence in him, was unquestionably more than he could stand. He dreaded, as I will show you further on, the mania, as he expressed it, which she had for making wills. He dreaded the ascendancy and influence which others might obtain over this old lady, and feared from the reports which he received from Sallie Hanley, the maid, and from others, that he was gradually losing his influence and control over her. He saw in his nightly dreams the vision of this golden egg, the whole of which he had hoped to possess himself, getting farther and farther away from him. He looked with terror upon the probability of having to rely entirely for support upon the impecunious revenue which his profession had heretofore brought him. This final \$80,000 was paid to Dr. Graves as Mrs. Barnaby's agent on the 21st day of March, 1891. He immediately, for a reason which needs no explanation, on account of what I have just said, through his brother-in-law, Mr. Rogers, who lived in the city of Boston, acting as broker for him, invested the greater amount of said sum in unregistered bonds and stocks in various electric railroads and other companies, which, of course, could at any time be transferred or sold by the doctor himself without the consent of any one, which was done entirely without the knowledge or consent of Mrs. Barnaby. The other money and funds which he retained in his possession were partly deposited in the Rhode Island Hospital Trust Company, in the name of Mrs. Barnaby, and which said funds were drawn by checks signed, and for the sole purpose of preventing a withdrawal of the funds from his hands, by Dr. Graves as her agent.

The balance of the funds belonging to Mrs. Barnaby were kept in another bank in the city of Providence in the name of Dr. Graves himself. During the trip to California, in response to Mrs. Barnaby's requests for money, Dr. Graves would send a personal check, which caused Mrs. Barnaby the greatest annoyance and trouble in order to get the same cashed. She found, and expressed in her correspondence with

the doctor, much annoyance at this method of procedure, and I think both Mrs. Barnaby and Mrs. Worrell chided him quite severely for such loose business methods. These expressions of dissatisfaction with his conduct of her affairs added, of course, to the doctor's growing belief that soon he would have no control of any part of her affairs. In all of his correspondence with Mrs. Barnaby during the trip to California, the doctor was most solicitous to be informed fully, for at least ten days ahead, as to her whereabouts. On the 30th day of March the package which contained the fatal bottle, was mailed at the Post Office in Boston, and was stamped as I have indicated heretofore. We will show to you, gentlemen, a peculiar circumstance connected with the stamps which this package bore at the time of its arrival in Denver. In February, 1891, the Government of the United States issued a new series of 15-cent stamps bearing Washington's vignette. Instructions were sent to the various Post Offices in the country to place such stamps on sale for patriotic reasons. On the 22d day of February, 1891, it transpired at the Post Office in Boston there were very few of the old series of 15-cent stamps left at that time, so the new 15-cent stamps were placed on sale at the Boston Post Office, and never thereafter were any of the old series sold at such Post Office. It also transpired that at the Providence Post Office they had in stock and on hand on the 22d day of February, 1891, when the new stamps were issued, something like 3,000 of the old series of 15-cent stamps. At the Post Office in Providence they put on sale the new series of stamps for the 22d of February only, to be patriotic, and then returned the next day to the sale of the old stamps of which they had such a vast quantity, and at the time this package was mailed at the Post Office in Boston, the Providence Post Office had in stock something like 2,000 of the old series of 15-cent stamps. As I have stated to you before, the package bore five of the old series of the 15-cent stamps, and two 10-cent stamps. It is quite evident, gentlemen, that whoever mailed this package in Boston, mailed it for the purpose, and

the sole purpose, of misleading and deceiving the recipient thereof, and mailed it in secrecy and with the fear of exposing themselves to any person whomsoever, for the package was overpaid 30 cents in stamps.

The inscription which was indorsed on this bottle could never have been placed thereon by any person having any sort of an honest motive or honest intention whatever. The package mailed in the latter part of March is certainly considerably strained in wishing a person a happy New Year at that time. The inscription on the bottle itself is enough to convince any honest man that the sender had some criminal and hidden motive. The handwriting on the bottle is disguised and strained handwriting, in every way unnatural, whoever may have written it, and most carefully inscribed. We are satisfied that we will be able to prove to you beyond a reasonable doubt that the handwriting on the bottle is the handwriting of Dr. Graves. The package was mailed, arrived in Denver and was delivered to Mrs. Barnaby and partaken of by her as I have already related. As I have stated before, Mrs. Barnaby died on the afternoon of the 19th of April last. On the afternoon of Saturday, the 18th day of April, when for the first time informed by the physician in attendance that Mrs. Barnaby could not recover, Mrs. E. S. Worrell, Jr., immediately telegraphed to Dr. Graves at Providence that Mrs. Barnaby was dangerously ill and that if he wanted to see her alive to come on immediately. Mr. Worrell also telegraphed to Mr. Conrad at his then home in Billings, Mont. Mrs. Conrad immediately started for Denver, and arrived here on Wednesday morning, before any response had been received from Dr. Graves. Mrs. Barnaby had died, and on Sunday afternoon, at about 5 o'clock, Mr. Worrell immediately telegraphed to Dr. Graves that Mrs. Barnaby was dead. This last message was received by Dr. Graves sometime about the hour of 8 o'clock in the evening. Dr. Graves left Providence for Denver on Sunday night about midnight, and proceeded to New York and arrived in Denver on Friday, the 24th day of April, almost six days after

Mrs. Barnaby's death, and six days after he had been notified of her death. During the entire time not one telegram or message of any kind was sent by Dr. Graves that he was on his way to Denver. The friends of Mrs. Barnaby heard nothing from him as to his whereabouts. On Sunday afternoon, the 19th day of April, a telegram was sent by Dr. Graves addressed to Mrs. Barnaby, in which he said for her to keep up good cheer, and that he would come to her at once. That was the only message which was sent by him. It is a fact, gentlemen, that a person in the city of Providence, R. I., at the time Dr. Graves made this trip, could have left on Monday morning, the 20th day of April, and have arrived in Denver with perfect ease at 6:15 o'clock on Wednesday evening, the 22d day of April. No one knew this fact better than the doctor himself, for a few weeks before that time he had occasion, under circumstances of death, to come to Denver to take back home the dead body of his brother, who at that time had died in the city of Denver. However, he did not arrive in Denver until April 24th.

The history of the reasons for this delay in his traveling is most interesting and most important to the issues of this case. Those reasons I will give you in the order in which they may logically come in this argument, but I call your attention to the fact now, and I wish you to bear it in mind as constituting a very important element in this trial. The various reasons assigned by the doctor to different persons and to different people in the beginning of this trouble of his trip westward, I will give you generally at this time. In the city of Denver he claimed to Mr. and Mrs. Worrell and others with whom he talked, that he had missed connections in every place, and that he was sick in Chicago and feared he was going to have an attack of the grippe. In Providence, in his conversation with witnesses whom we will produce before you he stated that he took a train which left Chicago somewhere between 6 and 7 o'clock, over the Northwestern road, and proceeded to the town of Sterling, Ill., where he stopped over to see an uncle who lived four or five miles out in the

country, and whom he had not seen for 30 years. He also stated that he returned and took the overland flyer that night at about 1 o'clock and proceeded to Cedar Rapids, where he again stopped over to see another relative whom he had not seen for years, and that evening took another train for Denver.

The cause of Mrs. Barnaby's death had not at any time been communicated to the doctor prior to his arrival in Denver, neither had any inquiries been made by him of anybody in reference to that matter. The doctor did not take the pains before leaving Providence to notify any of the friends or relatives of Mrs. Barnaby of her death, and she had many of both living in the city where she herself had resided nearly all of her life. Neither did he notify any of the trustees or executors of the Barnaby estate, or any of the friends of the Barnaby family. After his arrival in Denver he proceeded to the residence of Mr. E. S. Worrell, Jr., and talked with Mrs. Worrell, Sr., and with the grandmother of Mrs. Worrell, Jr., who happened to be in the house at that time. When asked why he was so long in reaching Denver he said that he had missed connections in every place, and that he had been sick in Chicago and feared he was going to have an attack of the grippe. His manner during this entire interview was that of a very much worried, excited and restless man. When told of the cause of the death of Mrs. Barnaby he was surprised, as he supposed she had had a stroke, and at once said that he had no doubt that the Bennetts had sent the bottle. He stated that it was too bad, as she had always been a good friend of his, one of the best friends he had ever had in his life. He was informed by Mrs. Worrell that Mrs. Conrad was here, and springing from his chair he wished to know where she was, whether in the house or not. He was informed that she was stopping at the Windsor Hotel, which had a very quieting effect upon his nerves. He would frequently exclaim: "I don't know what to think; I don't know what to think." When informed that the box had been mailed at Boston and that the doctors had pronounced

it a case of poisoning, he inquired where the body of Mrs. Barnaby was, and when informed said that he must go immediately to the undertaker's to see it, as she had been such a dear friend to him. As a matter of fact, however, gentlemen, the doctor cooled somewhat in his ardor to see the body, and during the entire time which he spent in Denver he never once visited the undertaking establishment or made any further inquiries from any one who knew with reference to the cause of death. He professed a great desire to see Mrs. Conrad also at once, and said that he would go to the hotel to see her. Mrs. Worrell told him that Mrs. Conrad was to take lunch at the house, and that she would be pleased to have him join them, which the doctor, for reasons of his own, failed to do. He then stated to Mrs. Worrell, "I can't tell you how I feel, it is all so sudden. I will have to get out into the open air and walk so I can think about it." He then visited the office of Mr. E. S. Worrell, Jr., on Arapahoe street, being the office of the Schermerhorn & Worrell Investment Company, and stated to Mr. Worrell what he had stated to Mrs. Worrell about his delay in reaching Denver and the causes thereof, was notified by Mr. Worrell that all the arrangements had been made to take the body East that night, and that all funeral expenses had been paid. The doctor said he must go and get a check cashed, as he had come away from home with but very little money. He went out and returned in a few moments, and then stated to Mr. Worrell that he did not know that he would be authorized to spend any money, as he was not certain who the executor was, and he had only learned in a general way that he, Graves, was the executor, and that it might be that Mrs. Barnaby had made another will. He was informed by Mr. Worrell that she had made another will, which had a very startling effect upon the doctor. Nothing more was seen of the doctor by any of the friends of Mrs. Barnaby until they met him at the train the night they started East. The party consisted of Mrs. Conrad, Mrs. Worrell, Sr., and Mrs. Clark, a cousin of Mrs. Conrad, who had accompanied her from Montana, and

Dr. Graves. The doctor avoided the party during the whole trip, and kept himself away from any association with them.

Shortly after Mrs. Barnaby returned to Providence in the winter of 1890, Dr. Graves, in a conversation with Mrs. Hickey, expressed his knowledge of Mrs. Barnaby's real dissatisfaction and discontent with his management of her affairs, and stated that if she ever undertook to take the management of her property away from him he would have her placed under guardianship, and, if necessary, in an asylum; and, again, about the first of April, 1891, and immediately after the package was mailed at the Boston Post Office, Dr. Graves dropped into Mrs. Hickey's house, which was one of Mrs. Barnaby's houses, on his monthly tour for the collection of rents from the tenants of Mrs. Barnaby, and in conversation with Mrs. Hickey at that time, he again referred to Mrs. Barnaby's dissatisfaction with his management of her affairs, and in substance reiterated what he had stated in the winter of 1890, and also informed Mrs. Hickey that she need not be surprised to hear at any time that Mrs. Barnaby had died from a shock.

When the party reached Jersey City, Dr. Graves left the funeral party and hurriedly proceeded to Providence, and in interviews by the Boston Herald and Globe correspondents he attacked the character of Mrs. Barnaby and sought to cast suspicion upon the Worrells and Bennetts.

Mr. Conrad would be unworthy the name of man if he did not aid in every legitimate way the prosecution in uncovering the terrible crime which has been committed. This he is doing, as becomes the relative and friend of the dead woman. Mr. Conrad, son-in-law of Mrs. Barnaby, arrived in the city of Providence on the first day of May, 1891, determined, if possible, to ascertain who the criminal in this matter was. After a consultation with his wife at the Barnaby residence in that city, and with Col. Henry B. Winship, the manager of the Barnaby store in Providence, Mr. Conrad telegraphed to the Pinkerton Agency in Boston to send some one to meet him in Providence. In response to that telegram, Mr. O. M.

Hanscom, the Assistant Superintendent of the Pinkerton Agency in that city, came to Providence the next day, Saturday, May 2, and held a conference with Mr. Conrad at the Narragansett Hotel, in that city. Mr. Hanscom had been an official in the city of Boston for many years, and his name and his character and his reputation were always above reproach. Mr. Conrad always believed that Dr. Graves knew very much about the commission of the crime, and he was desirous of ascertaining just exactly the extent of the doctor's knowledge. Taking the letter which had been sent to Mrs. Conrad as a basis, Mr. Conrad took a carriage and drove to Dr. Graves' residence, and was received by the doctor in the hall. He told Dr. Graves that he desired to discuss the matter of the death of Mrs. Barnaby with him, as also did Mrs. Conrad, and requested the doctor to go with him, which he did. They drove to the Barnaby mansion, and were admitted by Mrs. Conrad, and they found Mr. Hanscom in the parlor. They adjourned to the library of the Barnaby house, where for one-half hour they conversed with Dr. Graves with reference to the death of Mrs. Barnaby. It was agreed in advance between Mr. and Mrs. Conrad, that they would restrain and subdue their feelings during the painful interviews which they might have with Dr. Graves with reference to the death of Mrs. Barnaby, in order, if possible, to ascertain what information the doctor could give them at the close of the general conversation with reference to the matter. Mr. Conrad took Dr. Graves in the carriage and started to drive him home, when the doctor requested that the carriage stop two blocks above his house and then he alighted. Dr. Graves was most solicitous during this interview that Mr. Conrad should publish a statement that he had managed the property of Mrs. Barnaby well, and applauding him for his actions in that behalf. It was agreed that Mr. Conrad should meet Dr. Graves at the same place, two blocks above Dr. Graves' residence, the next night, Sunday, May 3d, which he did, and drove the doctor to the Barnaby house. Mr. Conrad discussed the will, the list of securities which Dr. Graves had

to show for the greater part of Mrs. Barnaby's money, and led Dr. Graves gradually up to a discussion of the crime itself. Mr. Hanscom was also present on this evening.

I might add that Mr. Hanscom was introduced to Dr. Graves as Mr. Conrad's brother, and he was treated as Mr. Conrad's brother during these several interviews at the Barnaby house. Dr. Graves finally suggested that the death of Mrs. Barnaby might have been caused by an accident and there was probably a bottle of pure whiskey sent, and it might have been exchanged on the road or after its arrival in Denver. The newspapers in the city of Providence and the dispatches which were sent out from the city of Denver were at the time leaning in their tone towards such a theory. Dr. Graves was of the opinion that this was the correct theory, but said that some one was continually blackmailing Mrs. Barnaby out of money and that at one time he had to get her \$500 in currency that she wanted to give some one. Both Mr. Conrad and Mr. Hanscom pressed him to describe or give some clue as to who the man was, but he did not do so.

He also advanced the theory that it was the Bennetts who had sent the poison, and especially Mrs. Bennett, and stated that he had no confidence in the Worrells, especially old Mrs. Worrell, who, he said, had been trying to get Mrs. Barnaby to make out a new will. He said that some one was continually trying to get Mrs. Barnaby to make a new will. He stated that he did not know the contents of the will that Mrs. Barnaby had made, and that no one knew it except the lawyer, but she had told him that she expected to leave the bulk of the fortune to Mr. Conrad's two children, and that he was in perfect ignorance regarding it except that Mrs. Barnaby had told him that she had remembered him in her will and that she had appointed him executor. The three gentlemen then went on to discuss the contents of the bottle having been changed in transit, or even after it had reached Denver, and that it might have been a bottle containing pure whiskey when it was mailed in Boston.

He said he thought the accident might have occurred in that way.

Mr. Conrad said to him: "Doctor, if it had not been for all this newspaper talk, don't you believe that the correct solution of this case would have been got at before?" "Yes, I do," said the doctor. "It would have all come out before this."

The interview on this night ended about 10:45 o'clock, and Dr. Graves, on his departure, said to Mr. Conrad: "You need not come over tomorrow night, but send the carriage to the same place at 7:30 and I will get in and come over here."

At 7:30 the next evening the carriage was in waiting for Dr. Graves at the place designated, two blocks from his house, and at 7:45 o'clock Dr. Graves arrived at the Barnaby house.

Mr. Hanscom, Mr. Conrad and the doctor went into the library, and the discussion began upon the doctor's request that Mr. Conrad should publish a statement applauding him for the management of Mrs. Barnaby's property. The conversation then turned to the crime. Both Mr. Hanscom and Mr. Conrad advanced the theory that there was a bottle of whiskey sent and that there had been a mistake, and it had got mixed with some other liquid.

Dr. Graves, as he had previously, took well to this theory, and intimated that he desired to talk to Mr. Conrad alone, and Mr. Hanscom left the room. After Mr. Hanscom left the room Dr. Graves again urged upon Mr. Conrad the publication of a statement applauding him for the management of Mrs. Barnaby's property, which Mr. Conrad told him that he would do, and which I believe he, the next morning did do by publishing some sort of a laudatory statement in the Providence Journal.

Dr. Graves then said to Mr. Conrad: "Now, Mr. Conrad, your wife is most anxious to get home and see her babies, and you take your wife and go home on the 12:30 o'clock train tonight, and say that Dr. Graves sent that bottle; it

was good whiskey when I sent it, and I will never deny having sent it. I will not, so help me God."

Then Dr. Graves said: "Can't you go on the midnight train with your wife, who is crazy to see her babies. The papers are running out of powder and steam, and the Denver grand jury will be over and this will soon die out and be a thing of the past. The State of Colorado is too poor to prosecute this case, and nothing will be done unless you furnish the money."

Mr. Conrad then said: "Now, doctor, let me bring my brother in here. You will make the explanation of this matter to him. Then you go to Denver and go before the grand jury and give the solution of this whole mystery as you have given it to me."

Dr. Graves said: "No, no, Conrad, I will not admit to your brother. I will not tell your brother nor any living soul. I will blow my brains out first. It would ruin me."

Mr. Conrad used every persuasion that he could to have Mr. Hanscom hear this statement, but to no avail. Finally Dr. Graves wanted to go home, and Mr. Hanscom came in and the doctor said: "Mr. Conrad and myself have come to an understanding and this thing is all fixed up, and I must go home." The carriage was ordered, the doctor left at about 11 o'clock that night, promising to come again on Tuesday evening at the same hour.

At about 8 o'clock on Tuesday evening, May 5, the doctor again arrived at the Barnaby house in the carriage which had been sent to meet him at the same place, two blocks above his own house. Mr. Conrad stated to the doctor that Mr. Pinkerton had been there that day, that he had discussed this matter with Mr. Pinkerton, and he was satisfied that the doctor could solve or give an explanation of the whole mystery if he so desired, and then Mr. Conrad urged upon the doctor to make a full statement, and to come out and publish it, in accordance with what he had admitted to him the night before. The doctor got up and moved the sofa in the room and locked the door, then opened the window blinds, closed

the curtains in the windows, to see that none of them were open, saying: "I am afraid of these Pinkerton detectives, and I want to satisfy myself that none of them are here." After making a careful investigation, he said: "Mr. Conrad, I did send this bottle, and it was good whiskey when I sent it, and some one has changed it in transit. But I may as well go to hell over one road as another. I will tell the truth; I did send the bottle of whiskey."

The doctor then told Mr. Conrad to call his brother, and that he would make the same statement to him, and added: "You have now got the truth; you must draw off these Pinkerton detectives and there must not be any indictment found against me in Denver, as the grand jury is in session." He also stated that the State of Colorado was too poor to make all of this expense, and it would not do it unless Mr. Conrad furnish the money. Thereupon Mr. Conrad called Mr. Hanscom in. Dr. Graves said to him: "Come in; I have told Mr. Conrad, I will tell you now, sit down here a moment."

At the same time the doctor drew a chair up near the one on which he was sitting and then said: "Now I want you to promise me on the honor of a Conrad you will not repeat in any court of justice what I am about to say to you, will you do it?" Mr. Hanscom said that he would.

Dr. Graves then said: "I sent that bottle to Mrs. Barnaby, and at the time I sent it it was all right and contained nothing but pure whiskey. I have now put myself in your hands and if I have put a rope around my neck I cannot help it."

Mr. Hanscom then asked him where he bought it, and other questions regarding the sending of it, etc., to all of which he replied: "I can tell you nothing more about it tonight; I cannot remember, my head is in a whirl; I will think it all over and will some time tell you more about it, perhaps."

They urged him to tell more of the story, but were unable to get anything beyond the fact that he had sent

good whiskey. The doctor complained of not feeling well and asked for a little whiskey, which was furnished him, and after drinking it he appeared to feel much better. He begged Mr. Conrad to call off the detectives and let the matter drop, and said: "They will keep on just as long as you furnish the money." They urged the doctor to go on and tell the whole story, but he said he could never do it, and would sooner die than to do so; that it would kill his wife and his mother, as he had always denied the whole thing to them. As the doctor was about to leave he said he would think the matter over and might make up his mind to tell them more some time, but begged them not to push him further now. He left the house about half-past 10 that night.

The next night at 7:30 o'clock the carriage was sent to the same place for Dr. Graves, and he sent back word that he could not come that night, but would come the next night if the carriage was sent for him. The next night at 7:30 the carriage was again sent for Dr. Graves at the same place, two blocks above his house, and at 7:45 Dr. Graves arrived at the Barnaby house. He met Mr. Hanscom and Mr. Conrad. The first half-hour was spent talking about the wills, and it was with some difficulty they could get him to talk about the bottle sent to Mrs. Barnaby by him. They both told him that if he was honest about the matter that the only thing to be done was for him to go to Denver and go to the District Attorney and tell him the truth of the case, as he had told it to them—that he had sent Mrs. Barnaby the whiskey, and that at the time he sent it it was all right, etc. They pointed out to him the fact that for the past two days some of the leading newspapers had advanced the theory that death had resulted from accident.

The doctor said many times, "I cannot tell even my wife what I have told you gentlemen about it. I have told you in confidence, and you have promised me you would not tell it even in a court of justice, and I expect you to keep your word." They then told him that it was a question with himself whether he went to Denver of his own accord or

went there under indictment. For fully half an hour he protested he could not tell his wife or any of the rest of the family about it; that every one of them would desert him if he did, for he had told them from the first that he knew nothing about it.

Continuing, he said: "No, gentlemen, I expect to die in jail, but I can never tell them the story. I will go home and pack up my things, for I know I shall be arrested and taken back to Denver, and I will die there rather than tell them about it, and I will not try to defend myself or spend any money in that way. What I have I will leave to my family." A little later he said he would think the matter over, and would go home and talk with his folks about it, and might make up his mind to go to Denver and tell the District Attorney the whole story. He further added, "I had better take a six-shooter and blow my brains out than to publish this statement, as my family as well as my friends would leave me."

Then they told him that he ought to either publish the statement or telegraph the District Attorney in Denver that he would come and explain this mystery. He urged upon them not to tell what he had told them as it would take his life away. Dr. Graves left at 9 o'clock that night, promising to let them know if he decided to go to Denver, or to make any statement.

The next day, the 8th of May, Dr. Graves left at about 6 o'clock in the evening the city of Providence for the West, accompanied by his wife. He had, prior to that time, telegraphed the District Attorney at Denver that he was coming to appear before the grand jury. On this trip he came by the way of Worcester, and arrived in Denver on Monday evening, the 11th of May. Prior to Dr. Graves leaving Providence, the Court appointed a custodian of Mrs. Barnaby's estate in the person of Col. Van Slyck. The application and order of the Court were obtained before Dr. Graves had any knowledge of the matter, and an order was issued on him to turn all property in his possession over to Col. Van Slyck.

On Sunday, May 10, the Boston Globe and the Boston Herald published as nearly as they could ascertain from some unknown source the conversations which Dr. Graves had had at the Barnaby house, the substance of which publications were telegraphed all over the country through the Associated Press. Dr. Graves, seeing that such a publication had been made by dispatches in the Chicago papers, wired to Denver to retain counsel and upon his arrival here of course had no desire to make any statement either to the District Attorney or to the grand jury. We will show you, gentlemen of the jury, beyond any doubt in the world that the defendant on trial was the only person in the world who could have had any possible motive for the destruction of the life of this old woman. We will show you by proof, both direct and circumstantial, that the contents of this bottle, which was mailed in Boston, were prepared by Dr. Graves and by him alone. We think we will be able to show you beyond any question that the inscription of the bottle, "Wish you a happy New Year. Please accept this fine old whiskey from your friends in the woods," is in the doctor's handwriting.

There is a solution of arsenic known as arsenite of potassium, which is formed by heating together carbonate of potassium and arsenious acid or white arsenic. This compound requires the skill of a chemist or a person with some degree of chemical knowledge to prepare. It is an article which is not kept for sale, I will venture to say, in a single retail drug store. In the city of Chicago, with its immense drug establishments, I believe that in only one has it been found already compounded. It is an article which is not used at all in the arts, but solely for medicinal purposes, and only in small quantities, as I have before stated, as it appears in Fowler's solution. It is an article which, of course, as you can see from what I have already stated, would require the knowledge of a somewhat experienced physician to even inquire for at a drug store, and which it would be utterly impossible for a layman to prepare.

We will show you, gentlemen, beyond any doubt in the world, that the liquid contained in this bottle of alleged whiskey was composed of a small quantity of alcohol and water and of two and one-half per cent of arsenite of potassium. Fowler's solution contains one per cent of arsenite of potassium.

We will show you that it was an utter and absolute impossibility from the facts which I have stated that this alleged whiskey could have been made from Fowler's solution, and that it must have been prepared expressly for the purpose.

We will show you that Dr. Graves was in the habit of going frequently to Boston because, as he stated, he could readily procure medicine there which he could not obtain in Providence. Of course we have no knowledge as to what the defense in this or any other case may turn out to be. That defense will probably, as is usual, be founded upon facts which can be most easily and readily utilized for the benefit of the accused. We propose that this prosecution shall stand upon its own merits without regard to what defense is interposed, and all that we can ask of you, gentlemen, is that you observe strictly the oaths which you have taken during the course of your examination to allow no sympathy, no prejudice, no feelings other than those of impartiality in enforcing the laws of the State to interfere with your verdict.

This is the most remarkable crime of any that was ever committed in the history of the United States, and the whole country will carefully and studiously watch its progress. If it is desired that the interests of the community whom you represent shall be protected and that Colorado shall have the reputation of enforcing its criminal laws—and we can prove to you the facts which I have attempted to outline, or enough of them to convince you beyond a reasonable doubt of the defendant's guilt of the crime charged, we will expect you to be courageous, patriotic and law-abiding enough to not allow any appeal to your sympathy, any sophistry or

any hair-splitting arguments which may be advanced to save one more defendant to the credit and glory of those who pride themselves upon their ability to acquit the most reckless and daring of criminals, but to return a verdict which can be sustained and applauded and upheld by your fellow men, whatever that verdict may be.

MR. FURMAN'S OPENING FOR THE DEFENSE.

Mr. Furman. Your Honor and gentlemen of the jury, I never speak to gentlemen in the discharge of such a duty as lies before me today without feeling the greatest embarrassment, when I reflect upon the serious nature of this charge, serious in its consequences not only to the defendant but also to society. And then when I reflect upon my many, many imperfections, upon my liability to make a mistake, perhaps to say something I should not say, perhaps for want of ability not properly understanding the case, or failing to say something I should say, I am almost overwhelmed with the sense of the responsibility that in part devolves upon me. And, therefore, gentlemen, at the outset I shall bespeak your patient indulgence and I shall rely upon your intelligence, your discriminating judgment and your sense of right and of justice to supply any omissions on my part. If I know myself, gentlemen, I have but one object, but one purpose, and that is to do my duty.

We do not come before you gentlemen, asking any favor, or with any unreasonable theories, but we come before you with the plain and simple truth. We cannot boast, as has the prosecution, that we have millions of dollars on our side. We rely upon the plain and simple truth. Gentlemen you have heard the opening statement of the prosecution, and as intelligent, fair-minded and honorable men, who want to hear both sides before you make up your minds, you are now doubtless anxious to hear what the defense has to say upon the statement which has been made against us. Gentlemen, when you have heard that statement, and the testi-

mony by which we will support it, you will see that there are two sides to this case.

If it be true that a bottle of poison was, as the State claims, sent in the manner in which the State claims it was sent, then I go further than the district attorney, who says the man who sent it was a coward. I say the man who sent it is a hell-deserving assassin, and that burning him at the stake would be a mild form of punishment indeed. Gentlemen, in the closing of his remarks the prosecuting attorney asked you to render a verdict that would be sustained by the people of the United States. I ask you, gentlemen, to put that idea out of your minds. I ask you, are you going to pander simply to public feeling? Are you going to pay attention to the cry, as did Pontius Pilate, of "Crucify him, crucify him?" I ask you, gentlemen, to render an honest verdict, let it shake and let it please whom it may.

And now, gentlemen, at the outset, I implore you by your oaths and by everything that is sacred in this life, and in the name of a human life, to put that idea once and forever out of your minds and to render in this case a verdict, so help your God, on the law as his Honor shall give it to you, and on the testimony as the witnesses shall swear it, let it please or shake whom it may. Is there anything wrong, gentlemen, about that? On the testimony and on the law we are safe. Outside of the testimony and outside of the law we may be lost.

Now, gentlemen, what is the object of this opening statement? Why, it is merely a preliminary skirmish. That is all. It is merely an explanation and an introduction in order that the jury may be better able to understand what each side claims and to see when the testimony comes in the relation which it bears to the rest of the testimony in the case, and to know before the witnesses are sworn what facts are going to be contested and what facts are going to be admitted.

Gentlemen, in this case we shall not deny a single word that is true. Many circumstances stated by the prosecution are true, and when I come to detail them in order there may

be many points about which there will be no contest. But then you will want to know what explanation we have to offer. I know you will. My experience as a lawyer teaches me that the more intelligent and honorable and honest the jurors are the more anxious both judge and jury are to hear both sides fully and frankly before they attempt to make up their minds. Now gentlemen, I cannot anticipate the argument in the case. This is merely a statement—not an argument. The State, that is the prosecution, makes the first statement. Why? Because the burden of proof is on the shoulders of prosecution; because it devolves upon the prosecution to prove by certain legal rules, which his honor will explain to you, the guilt of this man according to a certain legal standard.

The prosecution does not have the opening speech because the State favors the prosecution, but simply because this defendant enters on this trial with the presumption of law in his favor that he is positively and entirely innocent. That, gentlemen, is not an idle presumption, but it is one of those grand cardinal principles that are written over the portals of every criminal court, and that hang like an egis of protection round the accused from the very moment that he is placed upon trial until an honest jury have returned a verdict. Thus you see the prosecution makes the opening statement because the burden is on the prosecution, and the prosecution must prove that burden. It does not devolve on us to prove how Mrs. Barnaby came to her death, or to prove who killed Mrs. Barnaby, if in truth and fact she was assassinated. The burden is on the State, and therefore the State makes the opening address. And further, gentlemen, when the State has made the opening address the State does not want a victim. Why, the District Attorney said yesterday that somebody must be convicted or even the very communion service might be made the means of assassination. Gentlemen, I know that this is a most horrible and repulsive character of crime, but I pray, gentlemen, in all fairness and honesty, you will not allow your

prejudice against the form of the crime to attach to the man charged with it until he is proved guilty according to the law and the evidence, but try him on the merits of this case, for his honor, when he comes to charge you, I am satisfied will tell you in no unmistakable terms that this defendant is to be convicted or acquitted according to the testimony in his case and not, gentlemen, because forsooth it may be that some other man at other times or in other places or perhaps in this place has gone, you may think, unwhipped of justice. So much for these introductory remarks, which I consider necessary in reply to the District Attorney.

Now, gentlemen, for our statement. It is a simple statement from beginning to end. It is a consistent statement. Gentlemen, it is a true statement, and when you have heard the evidence, when as honest men you have weighed it and put it in the balance and judged it by the standard of reason and of justice, we have no fear but that you will accept it as a proper solution of the case, and we feel that your verdict will be like the still small voice which once spoke peace to the storm and will say, it is we, an honest Colorado jury, be not afraid. But now for our statement.

The defendant, Thomas Thatcher Graves, who sits before you, was born in Thompson, Conn., on Jan. 29, 1841, so he is now in his 51st year. His father, Thomas D. Graves, was a prominent lawyer in that State, being for more than 25 years the general attorney of what is now known as the New York and New England Railroad Company. Dr. Graves received his early education at the Rawson Family School, it being one of those numerous academies and preparatory schools for college for which New England is so justly celebrated and in which her people take such a deep and well founded pride.

At the age of 18 Dr. Graves accepted employment with the firm of Rufus Green & Co., and accompanied their manager, Mr. William E. Hyams, to Zanzibar, an island on the eastern coast of Africa, where the company had extensive factories. After being there something like a year and a

half, owing to complications caused by the war, Mr. Hyams was compelled to return to the United States, leaving young Graves, then not quite 20 years old, in the exclusive care, control and management of the entire business of that firm, which represented a capital of nearly \$500,000. Dr. Graves remained there until 1863. He had two brothers in the Union Army, and as the war progressed his soul caught fire with the inspiration of patriotism that moved his family and his countrymen, and so he wrote home to the company that he desired to return, to surrender an easy and lucrative position, and to take his chances in the great drama of war in discharge of what he thought was his duty to his country.

They sent some one to take his place, and young Graves returned to the United States. Having been so long in the tropics and returning in the fall he was seriously affected by the change of climate, but he went to the front. His brother was an aid-de-camp of Gen. Wertsell, and young Graves acted as a voluntary aide, without pay, discharging all the duties of a regular aide until February 1864. Upon the recommendation of Gen. Wertsell, under whose eyes he had acted, as a reward for faithful, unselfish patriotism and devoted and courageous service, he was given a captain's commission in the Federal army.

They say this man who sent this bottle was a coward. This defendant has a commission from the United States Government as brevet major for gallantry upon the field of battle, where brave men stood amid the hail of bullets, canister, grape shot and cannon balls. T. Thatcher Graves, the man whom they say is a coward, was the second Federal soldier to enter Fort Harrison in that memorable charge, and his Government has rewarded him with a commission as brevet major, which he now holds and prizes as life. He was one of the last men mustered out of the Federal service in 1867. What did he do then? He gratified an ambition which he had long cherished. He began the study of medicine. He entered Harvard College, and as his diploma shows, in 1871

he graduated at the head of his class and delivered the valedictory address in behalf of that graduating class. Now, gentlemen, we attach some little importance to this, and we ask you to note it. I cannot argue it now, but it is worth something. If circumstances are to be used against us, cannot we see circumstances in our favor? In this connection, when we have an opportunity to put witnesses on the stand, we will prove that there are numerous vegetable poisons, which every scientific physician knows of, which will take human life without leaving a trace behind. He was a man of science, thoroughly skilled, and had he desired to compass the death of this unfortunate lady the means were in his hands and power to have done so without leaving any trace behind, or any evidence of the means by which she died.

They say the man who sent this poison would endanger the life of a whole family. That is true, and that shows that it was either sent by a novice or that it was prepared as a trap to fix this crime upon someone else, and to cause such great slaughter as would raise indignation and supply the lack of proof. Now, gentlemen, after Dr. Graves's graduation he married Miss Emma Royce. We are not bringing any ladies before you in this case to excite your sympathy, but when the proper time comes she will appear before you on the witness stand and give her evidence, which we think will cut a very important figure in this trial. He stayed, I believe, at Norwich, in Connecticut, and began practicing medicine. He was in partnership with an older physician. In about six months that older physician died, and, being left by himself and not having the advantage of the association of an old and experienced physician, he thought he would change his residence to a larger place, and moved to Lynn Mass., and there practiced medicine for five years.

They say he was impecunious. Gentlemen, we cannot boast of our millions, and I do not know that it is going to help anybody in this trial. My experience and observation is that more men come honestly by poverty than come honestly by riches. Dr. Graves was never a beggar. His prac-

tice in Lynn netted him on an average something like \$5000 per annum. That may be a mere bagatelle to men with millions and the counsel who was so dazzled with wealth on account of association with millionaires, but for you, an honest, hard-working jury, you will not say he was a beggar or impecunious when making, as we will show you, about \$5000 a year. He practiced medicine at Lynn. That is on the coast, and the east winds, those cold, damp, winds coming from the ocean, affected the health of his wife and she was brought low. And, gentlemen, as Dr. Graves once before sacrificed an easy, lucrative and honorable position as the manager of a business of nearly half a million dollars and returned to this country to face death in a dozen forms upon the field of battle, as another duty, when he saw the wife whom he had sworn to love, protect, cherish and defend wasting away under the evil influences of those winds, as a matter of duty he gave up his lucrative practice at Lynn and moved to Danielsonville in Connecticut. He went there with his wife for her health. They had to carry her to the railway when he moved.

After he had been there for some time she began to improve in health, and the impecunious individual, this alleged tramp, began to get practice there. We have witnesses who will show that his father, an elderly gentleman, lived with Dr. Graves, each bearing half the expense of the home. They dispensed hospitality in true New England style. They kept open house for their friends, living at an expense of \$10,000 a year, that is, the two families, Dr. Graves paying his half of it. He is not a gentleman to hoard money. He is one of the open-hearted, generous men who make money to spend it and not to hoard it. He is one of those men who will aid a friend, who do not keep a dollar to brag about it and say—I have got so much. When I hear men say this or that man has got so much, that he has got a million, I say—you are mistaken, the million has got him.

Dr. Graves was not a man to hoard money. I do not claim he was a perfect man. I do not think that the counsel for

the prosecution will claim that any man is perfect. The sun has spots upon it. The great-God of day and of light and of heat and of life has spots upon it. We are not trying this man by an angelic standard. If we are, then I want the man who is without sin to be the first one to cast a stone at him.

After he remained in Danielsonville for a number of years Mrs. Graves health was restored. The town of Danielsonville is a small place. Dr. Graves went there first for his wife's health and then remained on account of his affection for his aged and honored parents. But a short time before this they had lost a loved and cherished brother, who in sickness had wandered away from home and it is believed had been robbed and murdered and lost forever, and Dr. Graves stayed there to cherish the declining years of his aged and honored father. In the course of human nature that father died, and then Dr. Graves, feeling that he could fill a larger field, moved permanently to Providence, R. I. Before he moved there he had opened an office in Providence, but every Saturday he returned home and spent the Lord's day with his father. Yet how bad a man and how deep-dyed a villian, according to the theory of the prosecution !

He moved to Providence and there the greatest misfortune of his life overtook him, or rather an event overtook him which has proved to be the greatest misfortune of his life. He became acquainted with Mrs. Barnaby.

Now, gentlemen, right here I want to enter an earnest, emphatic denial as to the State's charge as to the manner in which that acquaintance was formed, and when we come to the testimony and to show up the motives of witnesses there will be no shadow of doubt in your minds as to which side speaks the truth. Mr. Stevens eulogizes Mrs. Hickey. About one-half of his speech consisted of eulogies on his witnesses. Why, if he was not uncertain as to their testimony, did he consume his time in eulogizing them before they were attacked. Why, if he did not feel that their evidence was questionable, did he spend so much time in eulogizing them ?

I shall make no attack on the witnesses now. I prefer, and you will doubtless prefer, to hear their testimony on the witness stand, and to see their manner of testimony, and you will take with many grains of allowance the eulogistic statements made by the District Attorney.

What is our version which we promise to prove to you as to the manner in which this acquaintance began? I want to state right here that my statement shall be characterized by moderation; that my proof will go further than my statement, not only as to this fact but as to all other facts that I allege. If I thought that by too much zeal or any indiscretion on my part I should damage the cause of my client, the thought would never die in me, it would poison the sources of my happiness, make my life a burden and rob me of a peaceful sleep. I want my statements to be moderate. Perhaps I may be mistaken. If I make a mistake charge it to me. For God's sake don't strangle that man to death and give his body over as food for the worms on account of any mistakes that I may make. What is our statement with reference to the manner of this acquaintance, and we will prove it by two witnesses?

Mrs. Barnaby's mother, her parents, their home was nearly opposite the home of Dr. Graves in which he had his office. The first time that he, Graves, had ever laid his eyes on Mrs. Barnaby she apparently had been over to this old homestead. I believe her parents had recently died, and she came across the street to Dr. Graves' office and asked if he would allow her to use the telephone for a few moments. Courteous gentleman that he was, he told her yes. She did use it, and then, Mrs. Graves coming in, they sat down and chatted together. Mrs. Hickey was not there.

After this Mrs. Barnaby called again. Mrs. Hickey was not there but Mrs. Barnaby did state when she called that she had been advised by Mrs. Hickey to place herself under the care and control of Dr. Graves. We will do Mrs. Hickey that justice. Mrs. Barnaby did say, "I have been recommended by Mrs. Hickey," who had been a servant in her

family for some twenty years or something like that, "to employ you, doctor, in my case of paralysis." That is the way that Dr. Graves was employed. He never did recommend himself. He never did seek and ask for the case.

The prosecution made out to you that Mrs. Barnaby was a very simple minded old woman. If she was as simple minded as they say she was, and if they loved her as they claim they did, they should have put her under guardianship. But we will show you by witnesses, that, although she was unfortunately suffering from paralysis, and although she had a halting in her speech and although she was disposed to be extravagant in the expenditure of money, yet she was a woman of more than average intelligence. When the time comes I will show you her photograph, by means of which you can see that she was a woman of intelligence and that she was not the imbecile that the prosecution claims she was. At the time she placed herself under Dr. Graves' care she was paralyzed in her right side and almost helpless. There will be, I presume, no question but that she did derive great benefit from his treatment, and we agree that she was grateful to him on account of the relief which he afforded her in her helpless and stricken condition.

In September, 1889, Mr. J. B. Barnaby died leaving a will behind him; and although he was worth over \$500,000, he cut off the woman who started out with him in poverty, who had borne the burden and heat of the day with him in making this fortune, he cut her off with \$2500 a year. That is a large amount of money for many people, but not for a woman who has been accustomed to all of the things that wealth can afford and when that woman has helped her husband. No man can get rich unless his wife helps him. If there is discord at home, if there is a spendthrift in the house, no man can acquire wealth. He cut her off with \$2500 a year. In early life she would have regarded it as princely, but being accustomed to all of the luxuries it was cutting her off. They say she had large property interests outside of this. Her property interests outside, which she inherited

from her parents, yielded a rental of \$70 a month. That is not much income from \$50,000 worth of property.

When this will was produced she, deeming that she had been dealt with unjustly, that her paralysis was not a crime but was rather a misfortune and an affliction of Providence, contested the will. I have the record, and when the time comes we will produce it. She contested first upon the ground that when that will was made J. B. Barnaby was not in a proper frame of mind and could not make a legal will, and upon the further ground that injustice was done her, and this disregard of her rights was effected through undue influence, and third, that it was procured by fraud. That is what the record says. She employed the firm of Ballou & Jackson to fight that will. They say they are Dr. Graves' lawyers. That is a mistake. It is true that Dr. Graves and Colonel Ballou did attend Rawson's Family School together as boys. It is true that the friendship that they formed there in early life was cemented and strengthened by the common ordeal through which they had gone during the war. It is true that they were friends, and if Dr. Graves had needed a lawyer it is also true that he would probably have employed that firm, on account not only of friendship, but on account of their well-known ability and high character as attorneys at the bar. She employed this firm.

This contest was made in the language and upon the grounds I have just told you, viz.: first, that he was incapable of making a will on account of his mental condition; second, that the will was obtained through undue influence; third, that this will cutting her off was obtained by fraud. When the contest was filed no attention was paid to it. In a few days Colonel Ballou filed another bill to set aside to her a widow's allowance. I will not state now what happened or how the compromise came about, but it may be necessary for us to prove it and if it is we have the witnesses. But after proposition and counter proposition, after threat coming from the other side they did agree and proposed to give her \$105,000. This agreement, I believe, was made and the contract

was signed on November 12, but the decree was not entered until December 21.

In that decree the will of J. B. Barnaby was reformed by the sound judgment of the court and that injustice and wrong to the poor afflicted woman was wiped out. In place of \$2500 a year, there was a judgment making it \$105,000 that she was to receive out of the estate. That was done after consultation. Before the proposition was accepted by Mrs. Barnaby or her counsel they called on Mrs. Barnaby's trustee, friends and relatives, some of whom we may have on the witness stand before this trial is over. They called upon her relatives and friends, one of them Mr. Robert Sherman, and he said that under the existing condition of affairs in her family he would advise her to accept this \$105,000.

They say that Dr. Graves was very prodigal in the expenditure of Mrs. Barnaby's money, that Dr. Graves paid to Mr. Ballou \$10,000 as attorney's fee. Dr. Graves never did anything of the kind. Mrs. Barnaby herself fixed and agreed upon the fee. Dr. Graves did not collect that first \$15,000. It was paid by the executors to Mrs. Barnaby's attorneys and they fixed the fee, not Dr. Graves. The prosecution says that \$600 went for expenses. It did not do anything of the kind. The other side paid the costs. After this contest was filed Col. Ballou went to the executors and said, "Mrs. Barnaby needs money," and they advanced her \$500. They had previously advanced her \$100, and when they paid the first \$15,000, they deducted that \$600, money advanced and not costs expended, and they only paid Col. Ballou \$14,000, and he retained \$10,000, under his agreement with Mrs. Barnaby, having her receipt for it, and, when Dr. Graves was made her agent, also Dr. Graves' receipt for it, and he paid over to Dr. Graves \$4400 upon her order.

Now, gentlemen, a word of explanation as to how Dr. Graves became Mrs. Barnaby's agent. They say he sought it, that it was impossible to keep him from getting it. We will prove that at first he declined it, that Col. Ballou went with her to Mr. Robert Sherman and asked him, her cousin,

to take this trust and become her agent, and Sherman, being a wise man, doubtless anticipating some trouble in the future, declined to become her agent, and after that, at her earnest solicitation and request, Dr. Graves accepted this trust. Just here we want to deny the statement that he ever made to anybody, much less to a friend, that he was having a hard time to make a living until he got this employment. There is no truth in that statement. He was making easily an independent living, not only an honorable living for himself, but contributing to the living of others; delivering three lectures in behalf of the Grand Army which netted him about \$2700; delivering three lectures to aid the unfortunate comrades who had been with him in the war and giving every dollar of the proceeds to the Grand Army. He is not a man who craves money, but spends it freely, confident of his ability to make a living as long as he lives and with his life fully insured so that his wife will be protected in case of his death. He never made such a statement as they say. He could not have made it, because his income from his private practice was ample to meet all of his wants and expenses.

Now about Mrs. Barnaby's will. As soon as this agreement was entered into on November 12, 1889, Mrs. Barnaby applied to her counsel to write her will, and in that will, which was made solely at the instance of Mrs. Barnaby, she did bequeath to Dr. Graves the sum of \$25,000, and she did appoint him her sole executor, without bond. Mark that word "without bond." During all this time that Dr. Graves represented Mrs. Barnaby he was without bond. They say he collected \$80,000 on March 21, and she did not know it. When we put Mr. Wood, one of the executors, upon the stand, he will swear that Dr. Graves returned to the executors Mrs. Barnaby's receipt, signed by her, for that \$80,000. That is on a par with the rest of their misstatements. He wrote her, as we will show, early in March, that Mr. Anthony, one of the executors, had told him he was going to pay this money over, and he wanted to know where he could find her, so as to give her receipt as well as his receipt for the money.

I do not know what the Worrells are going to swear, but I know what the truth is and I know what we are going to prove out of the mouths of their own witnesses. She knew it. He had her receipt, which he had turned over to the executors for this \$80,000, before she ever came to Denver and we will prove it by their own witnesses. And, gentlemen, he was without bond. According to her expressed stipulation he was without security. If he wanted to act dishonestly we will show you that it was but ten hours' ride from Providence to Canada. If he had wanted to enrich himself at her expense ten hours would have enabled him to join that great army of bank cashiers who now represent the United States in Canada, for he was without security and without bond. Well, gentlemen, this compromise was effected and this \$15,000 was paid to Ballou & Jackson, her attorneys. Dr. Graves received, I believe, \$4400 of that. Subsequently to that time \$10,000 more was paid to Mrs. Barnaby. Dr. Graves receipted for that.

I believe she did have some money in the savings bank left by her father or mother or put there, we do not know how. I believe Dr. Graves got something like \$2,000 of that. That was all the money he had for her except what he collected as rents for those buildings, collecting from month to month. After this compromise, I do not know why and I could not express my opinion now, but I think the evidence will show why, before we are through, there was an estrangement between this unfortunate helpless cripple and her daughters. For some reason they did not get along well together. The matter was out and she did not want to stay at home and among people who knew of these discords, and so she spent the most of her time in traveling.

She did go into the Adirondacks as they claim. It is true that Miss Hanley went with her, and it is also true that when Mrs. Barnaby was up there she thought of purchasing a summer residence at an expense of \$12,000 up in the Adirondacks, and Dr. Graves heard of it, and seeing that her fortune would soon be lost unless her extravagance was curbed,

he did write her a letter and it will be in evidence before you, in the strongest terms as was his duty, entering his protest and telling her that if she went on with such extravagance she would be placed under guardianship. It is also charged that Dr. Graves spoke to Mr. Winship and to Mr. Anthony, and they have served us with notices that these gentlemen will be on the witness stand and they will corroborate our statements. Dr. Graves did consult with these gentlemen, the friends and business associates of her late husband, about her extravagance, and the question of a guardianship was discussed between them. He wrote her that letter. You may say that the letter was too severe, but the purpose that animated it was good. We do not dispute the letter, and when the letter is offered we will justify it. The letter was sent by Mr. Bennett to Colonel Ballou and by him preserved, and we thank God for it.

Mrs. Barnaby returned from the Adirondacks. They say that her feelings were hurt by Dr. Graves. We are going to show that up to the time she left California and started for Denver that her feelings were those of the utmost confidence in Dr. Graves, the most implicit faith in him and the strongest friendship for him, and we are going to prove it by evidence that cannot be gainsaid or denied. There was no strained feeling. She wrote Colonel Ballou to know if there was any danger of her being placed under guardianship or not. Doubtless on reflection she saw the folly of the investment she proposed to make and cheerfully abandoned it. She returned and went to Chester, Pa., and there at the instance of other parties, as we can show you, who did all in their power to poison her mind against Dr. Graves and to shake her confidence in him, she made another will. In that second will she again says, "I bequeath to my friend, T. Thatcher Graves twenty-five thousand dollars (\$25,000)." In that second will, which we will produce, she closes by making Dr. Thomas Thatcher Graves her sole executor. She would not share it with anybody else, notwithstanding the attempts made to poison her mind against Dr. Graves. She said: He

is my friend, I will make him my sole executor. In that second will there are some other features to which we will call your attention.

The State says it relies on the testimony of Mrs. Hickey. Mrs. Hickey is a beneficiary under that second will. They say they are going to rely on the testimony of Bennett, and Mr. Stevens lauds him to the skies. Bennett is a \$10,000 beneficiary under that second will. They say they are going to rely on the testimony of the Worrells, who are also beneficiaries to the extent of \$10,000. In the second will she gives Dr. Graves the same amount she gave him before, and she again appoints him sole executor of her will. It is not true that she had given him \$50,000 in the first will. The first will was not hastily made. She left the particulars with Colonel Ballou to make that will, and it was nearly three weeks before it was drawn up, and every provision in it was carefully discussed by Mrs. Barnaby, and she being a woman of good sense could never have told anyone she had left Dr. Graves \$50,000, because it was not true, and she knew it was not true, and though she is dead and gone, we say she did know it was not true, and we think we can prove to you she never did say it. After spending some time in Chester and making this new will, it is true that she did have a letter written to Dr. Graves asking him to return the first will to her, as she desired to make some change in it. That is true. Dr. Graves got that letter and wrote in reply, stating it was not convenient to send it then, but he would send it soon, and he afterwards received a letter from her not to send it, and therefore he did not send it.

She came to Denver. The District Attorney says Dr. Graves sent her medicine. That is true. She sent him a telegram, the original of which he now has, asking him to send her some nerve medicine and some medicine for rheumatism, sent in the care of E. S. Worrell, giving the address on Arapahoe street, and that is the reason why the medicine was sent. We will show that for years she had been taking his medicine almost exclusively. They say that this poison in

the bottle was sent eleven days after the money was collected. The collection of that money was immaterial, because there was a written contract and a judgment of the court that the money should be paid. She had a vested right in it, although she might have died before its payment, and her heirs would have received their interest in it just exactly as if it had been paid. That cuts no figure in this case one way or the other, because the payment was bound to come under the judgment of the court, and she could will that as well as she could the ready cash after it was collected. She then goes from here to California.

They complain that Dr. Graves sent his personal check and did not send her New York exchange. It is true that Dr. Graves sent his personal check. He sent it so that whenever that check was paid her endorsement on it would be a receipt from her for that money and there could never afterwards be a question as to whether or not she had received it, because the payment of the check would be a receipt itself. It was simply a question of business matters of which you may approve or disapprove. Some men pay all their debts that way and some do not. Some men save those checks paid as receipts and some do not. From the time she went to Pennsylvania up to the time of her death she received from Dr. Graves something like \$1400. We expect to show that during all this time she had nothing but confidence in Dr. Graves and entertained nothing but good will and friendship towards him.

She was with Mrs. Worrell in California. Mrs. Worrell preceded her to Denver, and mark well this statement. Mrs. Worrell knew, before that poison bottle got here, just when Mrs. Barnaby would get to Denver, and she got here before the poisoned bottle did. Mrs. Worrell shows up, directly the poisoned bottle shows up, and then poor, unfortunate Mrs. Barnaby shows up. They say that there are certain stamps upon that bottle. We do not dispute it. We have never seen it. We do not know. They say that that bottle was mailed secretly and by stealth. Well, gentlemen, if they

know that they know more than we do about it. They say there was 25 cents too much postage on that bottle. We will prove to you that Dr. Graves was almost daily sending out medicine through the mail to his patients, and that therefore he knew exactly how much postage it would be necessary to put on the bottle; so it must have been mailed by some one who did not know, or perhaps stamps used that came on another package.

They say that these stamps were on sale in Providence. We do not know. It is possible Dr. Graves may have bought such stamps, as he was buying stamps by the \$5 and \$10 at a time to mail his medicines through the country, and maybe he bought such stamps as these. They say there was something like 3,000 of those stamps there and that there are 2,000 still there. Dr. Graves did not buy all that were sold. We make no denial that there were such stamps sold there. Dr. Graves does not know whether he bought any of that denomination or not. It is possible he did, because he will show and the stamp clerk will show that he was a large patron in the matter of buying stamps.

Let us go back to Providence for a moment. I think it was the evening of April 19 that Dr. Graves first heard that Mrs. Barnaby was sick. He received a telegram from E. S. Worrell of this city informing him that Mrs. Barnaby was dangerously sick and for him to come if he wished to see her. Dr. Graves was at Newton Centre on that day. The telegram was received at his house and forwarded to him. As soon as he got it he at once telegraphed to Mrs. Barnaby "keep up a brave heart, I am coming," and he at once went back to Providence in order to prepare medicine for the relief of his patient and friend.

When his preparations were through and he was on the point of leaving, another message came, "Mrs. Barnaby is dead." When he was on the eve of starting to come after sending his telegram he got the message that she was dead and then, as his preparations to start were all made, as he felt it his duty to do, he came anyhow. He started for Den-

ver. Mr. Stevens says he was six days on the road. Let us see. He started on Sunday night and got here Friday morning. That makes four days and one night he was on the road. There is a great deal of difference between that and six days. He was thirty-six hours short, and when he takes the witness stand, and when other witnesses he will produce on this stand are sworn, you will see why he was short, and when we come to argue this case we will show you that that delay is not evidence of guilt, but rather of innocence. He arrived in Denver on Friday morning, went to the Gilsey house, changed his apparel, made himself presentable and went to the residence of Mrs. Worrell, at whose house he was advised that Mrs. Barnaby had died.

Gentlemen, some of the statements of the District Attorney as to what happened there are true, but his inferences, his conjectures, his suspicions we deny. Dr. Graves did call there in a courteous and gentlemanly manner. He did inquire after the cause of her death. He did make all such inquiries that were proper and that he should have made under those circumstances. Those were the inquiries he made and nothing more. He did go to the office of Schermerhorn & Worrell on Arapahoe street and inquire as to whether or not he could do anything, and he was told that the expenses were all paid and that arrangements had been made for the funeral party to leave that night, and then, seeing he could do nothing, that there was nothing for him to do, he spent the rest of the day with as good a citizen as lives in Denver, and we will have him on the witness stand to tell you how that day was passed. That night he was at the depot and accompanied the party.

We deny that he ever charged the Bennetts with it. It was to him a great mystery that he did not understand, and that he did not try to explain. Mrs. Conrad occupied on the trip East, I believe, the stateroom. She was by herself. Dr. Graves was there ready and willing at all times to do anything, but he was informed that everything was done, that there was nothing for him to do. They say that he left the remains

at Jersey City and went ahead of the funeral party. That is true. He got on the ferry boat at Jersey City, supposing the rest of the party were there, as they could have been there if they had wanted, but he did not know that they were not on until the boat was starting. When attention was called to it this young Clark ran back and Dr. Graves went on. I do not know how the other party came to be left, and it is immaterial anyway. Another thing, gentlemen, the funeral party at Jersey City was joined by Mr. Winship, and there was no necessity for Dr. Graves to run back and stay with them because they had both Mr. Clark and Mr. Winship with them.

Dr. Graves went home and when he got there he found his wife gone, that somebody had sent her a decoy telegram in his name asking her to meet him, I believe, at Danielsonville that night. He got off the car and during this time he had been reading the papers with their sensational accounts. He saw that the finger of suspicion was pointed at him. The reporters tried to interview him on the road from the train to his house, but he said: "Gentlemen, I have nothing to say." They plied him with all kinds of questions, to which he replied: "Gentlemen, I have nothing to say." He went to his house and found a false telegram had been sent to his wife in his name decoying her away from home telling her to meet him at Danielsonville. Smarting under the injustice that was being heaped upon him by the sensational press he dashed down to the telegraph office, if possible, to send his wife a telegram telling her that the first telegram was false, that he never had sent it, that he was at home waiting for her and for her to come home, and in the telegraph office they say it was the frenzy of despair.

It was another kind of frenzy, not knowing what had happened to his wife, or what effect matters might have on her. A reporter was present, and there was another man present who can say really what took place, as well as the reporter. While smarting under these indignities and the sense of wrong, the reporter began to ply him with questions again, trying

to implicate him out of his own mouth, and seeing the statements published about him, in an unguarded moment it is true that he did say that the Barnabys had better look to their own record. In an unguarded moment he did make some remarks reflecting upon the family, but those were the circumstances under which they were made, and that was the reason why that statement was made. After telegraphing his wife, telling her the first telegram was false, that he had not sent it, that he was at home persecuted and hunted as he was, his wife decoyed away, he made the statement, for we do not propose to deny a word that is true.

We are not afraid of the truth. He did make some statements and the next morning he found that the few words he had spoken had been distorted and magnified and increased until there was a vast sluice of stuff attributed to him that he had never uttered, and after his wife returned home and finding she was safe and alive, his fears being allayed, he wrote Mrs. Conrad a letter, that is the truth, telling her that in an unguarded moment he had let slip a few remarks which had been magnified and distorted into columns of stuff, that he was now very sorry he had ever said it, and wrote her like a man the circumstances under which he said it, and his willingness to do anything he could to make it right. They say that on the next day two reporters called at his house and that he reiterated and repeated what he had said in the telegraph office the evening before.

Two reporters did call at his house. Some things they attribute to him he did say, but those reporters were not in that house or in his presence more than three minutes at the outside. We have got other witnesses to prove that. Dr. Graves was never seated. The servant let them in. When he went into his office he found them there, and they began to ply him with questions, and he said: "Gentlemen, I have nothing to say; I do not want to be interviewed." Still they plied him with questions. Entering his home unbidden, uninvited and not wanted, they plied him with questions. He said he had written to his wife and said: "I keep a journal

and write every day." They would first ask him one question and then another, but not one single word did he utter in that conversation reflecting on Mrs. Barnaby. He did not say that he was at the autopsy. It is not true. He did not say she died of poison, because he did not know. He did not say anything reflecting on the Worrells, because he did not know. He did not say anything about the Bennetts, because he did not know. Question after question was fired at him. It was a one-sided interview, and thus, gentlemen, this other stuff is a matter of pure manufacture, and we will prove it.

Then we come to this Conrad interview and there are two sides to that like everything else. When the testimony comes in, and you have heard it you will have no difficulty in saying which side is right. They say that he called at the residence of Mrs. Hickey and that he stated that he knew that Mrs. Barnaby was dissatisfied with him. Gentlemen, he never said so. He not only did not do it, but he had no such knowledge. He not only had no such knowledge, but we have got it in black and white and will offer it to you that she was not dissatisfied with him, but that he had her utmost confidence and undivided friendship. They say he told Mrs. Hickey that she need not be surprised if Mrs. Barnaby died from a shock. It is not true. He never said it and I think, gentlemen, notwithstanding Mr. Stevens' eulogy on Mrs. Hickey, when you have heard all the evidence and then come to see her motive for swearing in this case, you will join with me in saying that he never said it. All these statements, these alleged statements, to Mrs. Hickey we do most emphatically deny. Every one of them we put in issue.

We enter a denial and we ask your candid judgment when the evidence is in and when you have heard His Honor's charge as to the rule by which that evidence is to be governed and considered. For, gentlemen, right here, as you already doubtless know, this case is to be decided by the charge of the Court, and as honest men you will withhold your judgments until His Honor gives you the rules of law by which you are to decide this testimony. I speak, of course, entirely extem-

poraneously. It may be possible that I have forgotten or overlooked some charge up to this time that they have brought against us. If I have, it is simply because I have forgotten it. Whatever is true we will most truly admit, but we do desire to be understood as entering a positive and emphatic denial of every circumstance mentioned by the State which indicates Dr. Graves is guilty of this crime.

The Saturday after a new figure appeared upon the scene. Mr. John Conrad called at Dr. Graves' residence and introduced himself as the son-in-law of Mrs. Barnaby, and was introduced to Mrs. Graves. He said: "Mrs. Graves, I am glad to see you; I am the son-in-law of Mrs. Barnaby; I am the husband of Mrs. Mabel Conrad. Doctor, I have seen your note to my wife with reference to these scandalous statements; I am a Western man; we Western men are always willing to meet every man half way, and I called on you to say I appreciate your letter and your motive, and I invite you to my house tonight to talk this matter over with me, my wife and my brother, Charles Conrad." Dr. Graves, in his innocence and honesty, thought the man was telling the truth. He accepted the invitation.

He did go to that house that night as he thought to talk over the publication of a statement. When he got there he met Mrs. Conrad, who met him in a very kind and courteous manner, and he was introduced to a man he was told was Charles Conrad, the brother of John. They met him kindly. After talking for some time Mr. Conrad got up and said, "This parlor is too big to talk in; let us walk into the library and talk this matter over. In the library they had some whiskey and Charles Conrad and John Conrad of Virginia drank some whiskey, but did not offer the doctor any that night. Mr. John Conrad said, "Well, doctor, what has become of the property? How have you administered the property? The trouble seems to be you have not administered the property properly." Dr. Graves said, "Mr. Conrad, my books are straight; I have them at the office; you can come down tomorrow and inspect the books; the property is now all in the

safe deposit vaults of the security company in Boston; you can go and inspect; my books are straight." John Conrad said he would do it.

The conversation that night was about this property and Dr. Graves' explanation of it. John Conrad said: "If I had met you in Denver all this trouble would have been avoided; you do not need a lawyer; let us not have a lawyer to eat the thing up in expenses; you and I will settle it." Dr. Graves, in his innocence and honesty, believed him. The next day, or the same evening, John Conrad went down to the house of Dr. Graves and examined the list of securities and the books. And the next day, on the holy Sabbath day, when men should be thinking of purity and truth, Dr. Graves was sent for again by John Conrad. "Come over, doctor, and let us make arrangements to go down to Boston and look at those securities." The doctor went over and Conrad said: "When we go to Boston we must go separately; do not let the reporters get hold of this; keep them out of it; you and I can settle this, doctor." So the next day they went to Boston. They went separately. Dr. Graves went with his wife. We do not know how John Conrad went, but we know he got there.

He met Dr. Graves at this safe deposit vault and Dr. Graves produced the securities and they looked them over. Conrad said: "Doctor, you are worthy of praise rather than censure; you have invested this money wisely and well and I shall take pleasure in publishing a statement over my name stating you are entitled to credit rather than censure for your administration of this estate." Dr. Graves believed him, and was pleased with this and said: "Mr. Conrad, I think this is my right and my duty; I have been unjustly accused; here you see before you I have receipts for every dollar; I can account for the last farthing." So Conrad said: "Come over to my house, doctor." That was Monday. "Come over to my house, and we will formulate a statement and I will publish it in the papers, showing that you are entitled to more credit than blame for your administration of this estate." Dr. Graves went that night to Conrad's house. When he got there he

found John Conrad and Charles Conrad and John Conrad said: "Well, doctor, I cannot do it tonight; it is too late; but we will fix it up; it is too late to put it in the morning papers; but we will do it."

Then he began to talk about this case. He said: "Doctor, you do not know how much this is to me; I have political aspirations; I contributed last year \$25,000 to the campaign fund of the Democratic party in Montana; I will contribute as much in the next election and I hope to be the Governor, and with a little more I can get to be United States Senator; but this thing is going to hurt me; now if I can only show that there was a mistake, if I can go back to my constituents in Montana and say it was all a mistake, it would be different; doctor, don't you think anybody sent her a bottle of pure whiskey and it might have been changed in the mails? Cannot you help me doctor?" Dr. Graves said: "Mr. Conrad, I do not know anything about it." But Mr. John Conrad said: "Doctor, don't you think the Bennetts did it?" Dr. Graves said: "No, sir, I do not know anything about it; I came over here for a statement that my accounts were all right and I do not know anything about the bottle of whiskey."

Then John Conrad said: "I think there was a bottle of pure whiskey sent and I believe the Worrells changed it, and if I can get some one to say he did send it I would fix it on the Worrells; old man Worrell is bankrupt; his creditors are pressing him; he has an interest in that second will; if I could prove that somebody sent a bottle of pure whiskey, I would fix it on the Worrells." Dr. Graves replied: "I do not know anything about it." Mr. John Conrad said: "I have political aspirations and unless I can explain this thing to my constituents in some way, why it is going to interfere with my political aspirations." That, gentlemen, was Monday night. The doctor was told by John that he and Charles had been drinking a lot of whiskey. They pretended to be drunk then and asked the doctor to drink, and the doctor declined. The doctor went home, and John Conrad promised him if he would come back on Tuesday night they would fix up the statement about the business and he would publish it over his name.

On Tuesday night the defendant went back again on the promise that this statement was to be prepared for publication. At last a partial statement was published on the following Wednesday morning. What did he find? Mr. Conrad made out he was drunk and said: "Hello, doc, come in and take a drink with me." Dr. Graves said: "Thank you, Mr. Conrad, but I would rather not. I simply wish the statement." John Conrad said: "You — — — old Puritan, you have a drink with me anyhow." Conrad put his arm around the doctor and pulled him over to where the whiskey was, and Dr. Graves, seeing the good the man could do him by publishing the promised statement, and not wishing to anger him, did take a drink with him. Conrad said: "Doctor, let us go to New York; let us have a good time; let us paint the town red." The doctor said: "No, sir; I do not do business that way; I have come for that statement." Conrad said he would publish it and he did publish a statement next morning, but did not publish the statement he had promised, viz.: That Dr. Graves was entitled to more credit than blame.

What happened next? Dr. Graves was feeling badly on Wednesday night and had retired to bed. Conrad sent for him again. As he had retired to bed he declined to go. John Conrad then wrote him a letter: "Doctor, I want to talk to you about the will; there is a great deal of difference between the first and the second one; come over and let us talk about these wills." In the first will we will show that each one of Conrad's children was left \$25,000. In the second will that bequest was cut down to \$5000, making a difference, I believe, of \$40,000. He said in this letter: Come over and let us talk about the wills. We have got the letter. Dr. Graves was feeling badly and remained in bed. Thursday night Conrad sent for him again. 'Come over and let us talk about the wills. The last will cuts my children out something like \$40,000.' Conrad got Graves over and what did he do? When Graves got over there Conrad said: "Here, doctor, I want you to sign this paper." "What paper?" said Dr. Graves. Conrad says: "I want you to sign a paper acknowl-

edging that you sent Mrs. Barnaby a bottle of pure whiskey. Dr. Graves says: "I cannot do it." Conrad says: "You told me so on Tuesday night, and by God you have got to do it; I have given \$20 each to 10 reporters and I have bought up the Boston Herald, and I can make public feeling for you or against you, and if you don't sign this paper I will have you taken to Denver; I am a Western man and will stock a jury on you, and I will convict you unless you sign this paper." Dr. Graves replied: "You are a Conrad of Virginia, but I tell you, sir, before I will sign a paper like that I had rather be a prisoner in the dock; it is not true, and I have told you so, and I will hang before I will make any such statement; I will not do it; let me out of this house."

Finding he could not bulldoze the doctor he then changed his tune and tried to persuade him, but the doctor said: "I do not want to convict the Worrells or the Bennetts; I did not send it; I know nothing about it; let me out of this house, sir." And he let him out of his house. And then, gentlemen, not at John Conrad's instance, he did go home that night and the next day he telegraphed to the District Attorney here: "I am coming with my wife and not with John Conrad. I want to go before the grand jury." Then, gentlemen, as he looked this matter over, as he saw how intense Conrad was, he did not have legal advice; he thought it best to consult attorneys before he went before the grand jury, and he came and employed my firm. The reason he did not go before the grand jury was because the statute law of this State, as we advised him, is that no witness shall be examined by the grand jury except those for the people. He was advised by his counsellor that the grand jury could not hear him because the statute was so worded, and therefore, gentlemen, acting under the advice of his counsel, he did not go before the grand jury, but preferred to postpone the matter until a petty jury could hear both sides of the case, instructed by His Honor, and render an honest verdict in this case. To you he will make his statements and offer his witnesses. He could not so go before the grand jury, who have no right to pass on such a

question. If there is sworn evidence sufficient to indict a man the grand jury indict him.

The prosecution made some capital out of the fact that the carriage never stopped at Dr. Graves' door in Providence, but that it stopped two doors off. That was at John Conrad's instance. John Conrad told him, "We do not want the reporters to know it; we want to keep this thing out of the papers; there has been too much published about it already, and, therefore, we must settle this quietly; I will publish this statement; you will be exonerated; I will be all right and my political aspirations will not be interfered with." It was for John Conrad and at John Conrad's suggestion that he went every time and that he went as he did. Gentlemen, I thank you for the kind and patient attention you have given me. I have briefly presented our case. I could have spoken all day, but I have not tried to do so. I have no set speech to make. I have simply tried to call your attention to the solution of the points in this evidence, for you to bear these points in mind as the witnesses are on the stand. Watch well the demeanor of each witness; inquire diligently into the motives of a witness, because we shall have evidence on that question.

Gentlemen, in conclusion, I ask you to consult no one, consult nothing except his honor's charge, consult no fact except in evidence, and then, gentlemen, rise in the majesty and dignity of true manhood, exercise true courage. Physical courage is commendable, but there is a higher and a nobler courage than that. There is a moral courage which is sublime. I ask you then, gentlemen, to stand to this record, let it please, let it shake whom it may. We have no appeals to make except to intelligence, to testimony and to law. We ask you to render a verdict on the facts in this case and not on the facts of any other case. It matters not, although I may be a stranger to you, what your friendship may be, I believe that you are honest men. Whether we agree upon matters of government or not, I do not care. I believe in the intelligence and the integrity of this country, which is divided on those questions. There are as good men on one side as on the other.

I will ask you, gentlemen, not to allow these matters to operate. No, I will not ask you because I know you will not.

I stand on truth and my speech, therefore, is simple. You are not going to reward one man or punish another. You are not here to convict one man because some one else should be convicted. The very mention of such an argument shows weakness in the side which advanced it.

I know that this man, who is a stranger within our gates, will receive a fair trial at your hands on the merits of his case and his case alone; that you will not be influenced by any outside consideration whatever. Therefore it is with confidence that we submit our case to you.

THE EVIDENCE FOR THE STATE.

George W. Domett. Am chief clerk of the stamp department of the Boston postoffice; there was a change in the issue of 15-cent stamps February 22, 1890. The original issue was orange, but was changed to blue, with a vignette of Henry Clay. Since June or July, 1890, the Boston office had not sold any of the orange 15-cent stamps. In mailing packages the instructions are to sell the smallest number of stamps possible to carry the packages. If it took 95 cents to send a package the practice is to sell a 90-cent and a 5-cent stamp, but if requested other denominations would be sold. A 15-cent stamp is less used than others, as it is an odd number, and does not fit the calculations of patrons of the mail so well. Stamps leaving the Boston office are cancelled with a rubber stamp; I identify the cancellation mark on the stamps which were taken from the wrapper around the bottle containing the poisonous fluid which Mrs. Barnaby drank, also

the rubber stamp employed in the cancellation.

Cross-examined by Mr. Macon. Do not know that the old issue of stamps could be bought in the country post offices of Massachusetts. It was the custom of the druggists, hotel keepers and others to buy stamps in large quantities to supply their customers. Merchandise costs one cent an ounce, and a package weighing a pound and a half would require 24 cents.

To *Mr. Pence.* Druggists and hotel keepers usually confine their purchases to 1-cent, 2-cent and 5-cent stamps. The clerks are instructed to inquire particularly as to the contents of packages; the law prohibits sending liquors through the mail; it makes no difference if the package has more stamps than necessary.

John J. Devenish. Am in the stamp department of the Providence postoffice; have sold the orange 15-cent stamp and blue Henry Clay stamp in 1890 and

1891; made a requisition for 100 of the new issue Feb. 21, 1890, which were sold in a few days, and from February, 1890, till July, 1891, only orange 15-cent stamps were sold at the Providence postoffice. There were orange stamps on sale the last of March, 1891; do not know in what quantity. The rule of the office was to give the smallest number of stamps required to carry a package. If the required postage was 95 cents, the practice was to give three 30's and a 5. It would be easy at that office to deposit packages unobserved, as the mailing place is in the main lobby which was used for public purposes; have known Dr. Graves a year; he has bought stamps of me, as high as \$20 worth at a time; remember his having bought 2, 5 and 10-cent stamps; do not remember his having ever bought 15 or 30-cent stamps; am on duty only half of the time the office is open.

Dr. Graves told me he was sending medicine through the mails. He used mostly cylinder wood boxes, which are for sale at our office; he told me he had an excellent thing in a liquid medicine, and he believed he would make lots of money out of it.

Cross-examined. Do not know whether any other offices in Rhode Island, beside Providence, sold the orange-stamps.

Prof. J. A. Sewall. Have made a specialty of chemistry for 17 years; have been a professor in the State Normal University of Illinois and also President of the State University of Colorado. Dr. Holmes, Mr. E. S. Worrell and another gentleman brought me a bottle to be

analyzed; found it contained arsenic, alcohol and other ingredients; 21 per cent about was alcohol. Nearly 21-2 per cent was arsenic. The distinct form was arsenite of potassium (white arsenic). The bottle contained 132 grains of this poison, about 11 grains to the ounce. If the bottle contained whiskey, it was very much diluted; thought it contained no whiskey. Besides the water, arsenic and potassium, some aromatic substance was in solution. This solution could have been formed by dissolving the arsenic of commerce in water. This arsenic is used principally for medicinal purposes, though it is occasionally used for destroying insects. When I got the bottle it was corked and sealed, with the watch-chain seal of Dr. Holmes; delivered the bottle to Mr. McParland on the order of the District Attorney. This vial contains the sulphur I obtained. Here is the arsenic I secured during the determination.

Cross-examined. The bottle was about a pint and round; it was not full when it came to me, but contained about 11 ounces; was not told what had become of the other five ounces. The contents was a brownish-red, not a whiskey color.

Superintendent McParland. I identify the bottle; obtained it from Dr. Sewall; gave him a receipt for it; am Superintendent of Pinkerton's Detective Agency in Denver. The bottle has never been out of my possession since I received it; was with Prof. Haines all the time he had the bottle. After Haines finished I resealed it; broke the seal once before I carried it to Prof.

Haines, when I showed it to the grand jury; it has never been out of my sight since I received it; locked up in my private drawer; am sure it has not been touched by any one.

Dr. Sewall (recalled). Made the preliminary test for mercury, but found none, but discovered a trace of arsenic and at once made a test for that metal; in testing for arsenic used Marsh's test; added sulphuric acid and zinc to the solution from the bottle and got arsenicated hydrogen, which is a gas. This passed out of the flask, through a tube, in which it was deposited as metal arsenic. This tube was heated and the gas passed along the tube until it came to a cooler portion, where the metal arsenic was deposited. To determine the quantity of arsenic I weighed the tube before the test and after the arsenic was deposited, and the difference gave me the amount. What was in the tube was known as metallic arsenic; tested the copper used in the test. Copper, sulphuric acid, etc., are very often found with arsenic in nature; always test my chemical ingredients to see that they are pure. I take no one's word for it.

There are some organic substances that give a precipitation

much similar to arsenic, but they are very easily distinguished from arsenic. Arsenic can be told by the shape of its crystals, which are octohedral. They also have a peculiar brilliancy. Marsh's test is considered thoroughly reliable.

Did not test the liquid for potassium; did not taste the liquor until I had made the preliminary test; thought by the smell and taste that there was alcohol in it; tested and found alcohol. The amount of arsenic found could have been held in solution in whiskey as well as in the fluid in which I found it. A person drinking an ounce of this fluid would get about 12 grains of arsenic.

Walter S. Haines. Am professor of chemistry in Rush Medical College, Chicago. Toxicology, that part of science which treats of poisons, have made a specialty of, and teach it in Rush College. Frequently I am called on to examine food, medicines, liquids, etc., for poisons; have examined between 90 and 100 bodies for the presence of poisons and scores of food bodies—over 100. Received in Chicago, from Captain McParland, some liquid to examine for poison. That is the bottle that contained the poison.

Mr. Macon. We object to Prof Haines' examination. It is all ex-parte and not competent. We should have had an expert at the analysis, as it was made after the indictment of Dr. Graves. Wharton says representatives from both sides should be at such an examination as the one Prof. Haines proposed telling about. Ample opportunity had been given to tamper with the bottle, and, consequently, any analysis of its contents would show nothing as to what was therein when Mrs. Barnaby took the deadly draught. This analysis has no business in court either on the ground of legality or justice.

Mr. Belford. If the objection of counsel is entitled to any weight

at all, it would run to the credibility of the evidence and not as to its admissibility. The evidence of Prof. Haines would go to the jury under all the circumstances under which he received the bottle. No authority can be adduced that would hold otherwise. The law read by Judge Macon refers to a post-mortem examination.

Mr. Pence. Wharton quotes no authority for his statement.

Mr. Macon. I supposed Dr. Wharton was himself an authority. Where a volunteer carries this bottle around the country, there has been plenty of opportunity to tamper with it. Here a volunteer carried it about and gave it to Dr. Sewall, and another carried it to Chicago and delivered it to Professor Haines there. The testimony shows that the seal was intact, but before the seal was put on, has it been shown that there was no fraud perpetrated?

Mr. Pence. There has before been no intimation, as Judge Macon suggests, that this bottle has been tampered with. The testimony has shown the absolute integrity of this bottle. We must be governed by the rule that allows the judge to instruct the jury as to their duty in believing the testimony.

The COURT. Are the contents of this bottle the same now as when deceased drank of it? That is the question involved here. When the analysis is offered in evidence the question arises: "Have the contents been tampered with?" Before the analysis can be admitted it must be shown that the integrity of the bottle has been maintained. This is Mr. Wharton's doctrine. His words are broad, and convince the court that there must be a showing to the effect that there has been no tampering with it. Otherwise the evidence would be valueless. Mr. Wharton makes it clear to me that the only question that can be raised at this time is as to whether the integrity of the contents has been shown sufficiently. In my opinion it has been sufficiently shown. The objection will be overruled and the testimony will be accepted.

Professor Haines. The contents of the bottle given me by Mr. McParland I analyzed, and found it to be composed of water, alcohol, arsenic and some coloring matter. The essential composition was alcohol holding in solution 21-2 per cent of arsenic in the form of arsenite of potassium. This composition is very soluble in water. The fluid examined was not Fowler's solution. That solution contains only 1 per cent of arsenic, and this contained 21-2 per cent. Arsenious acid is the form of arsenic generally kept in drug stores. Fowler's solution could

only have been used in this case by distilling the solution, and if a considerable amount had been distilled, the amount of arsenic found in the bottle might have been obtained. Arsenite of potassium, except in the powdered form, is not used in medicine. This form of arsenic is not generally found in drug stores. Have tried to buy it in eighteen drug stores in Chicago and found it only in three; tried four stores in Denver without finding it. It is only occasionally used by chemists in experiments, and can be obtained only on a prescription. The solution

I examined was not whiskey. It did not have the requisite percent of alcohol. Then whiskey has certain odors which this did not have. If there was any whiskey in it, it was so small I could not detect it. The bottle was two-thirds full when I got it. I left in it about the same amount that is now in it. Arsenite of potassium can be prepared by buying the arsenic at the store, and boiling it with carbonate of potassium. Its manufacture would require considerable knowledge of pharmacy; subjected the compound to several tests, and found arsenic two and one-half grains at each test; examined the cork of the bottle microscopically. It had been in contact with this fluid, or some other of a similar nature, for some time. Arsenious acid (white arsenic) is what is generally sold at drug stores. This is used in killing vermin, tanning, dyeing cloths, etc.; do not think a person not a chemist or doctor could get arsenite of potassium. That is what was in this solution.

Cross-examined. Received the solution on June 24 from James McParland. You cannot buy the solid arsenite of potassium, but you can Fowler's solution. Fowler's solution is used in fever and ague and also for skin diseases. To extract the arsenic from Fowler's solution you would simply evaporate the solution. It could be easily done. The United States Dispensatory kept at drug stores tells how to compound arsenite of potassium as found in Fowler's solution. It is not a difficult process when you have the requisite knowledge. About two grains of arsenic is, in

most cases, a fatal dose. Arsenite of potassium is very rarely called for at drug stores, and is so violent a poison a druggist would exercise more than usual precaution in its sale. Having obtained the arsenite of potassium it would be a simple matter to add alcohol, whiskey or anything of like nature. They would readily hold it in solution.

To *Mr. Stevens*. The ordinary arsenic takes effect in about half an hour; but this solution would take effect much sooner. Fowler's solution could not be employed so as to produce the kind of liquid we have here without evaporation. It would be utterly impossible to make it from the solution directly. It is not possible for an unskilled person to make this solution. First, ordinary people, without a knowledge of chemistry, would not know that the compounds used were in existence. Secondly, if they did, they would not know how to combine them.

Prof. William P. Headden. Am an analytical chemist at the head of the School of Mines in Dakota; was for five years Professor of Chemistry in the University of Denver; examined some solutions that were taken from the bottle out of which Mrs. Barnaby drank. Dr. Sewall gave me the liquid. He gave me two-thirds of an ounce and three drops; found arsenite of potassium in the bottle; examined a part of the stomach—the kidneys and about three ounces of the liver; found arsenic in each and all of the parts of the viscera examined. In the liver I found one-twentieth of a grain; received this viscera from Mr. Rogers of I. N. Rogers, undertaker,

on the orders of the District Attorney. No part of the liquid I examined was whiskey; could detect none. In the kidneys I found four and one-half grains. Two grains are fatal; examined four and one-half ounces of brain matter, which was taken with the stomach. The total was greater than that procured from the viscera.

Dec. 5.

Cross-examined. Never was admitted to practice medicine; had studied medicine, but only for the purpose of perfecting my specialty.

Arsenic acts as an irritant in the stomach before it is absorbed. It is not true that before absorption it is as harmless in the stomach as flour. It is the arsenic that has got into the circulation and not what is found in the stomach that produces death. In cases of death by arsenical poisoning arsenic is found in the spleen, liver, brain and kidneys, particularly the kidneys. Arsenic is generally eliminated from the system inside of two weeks.

Dr. Anson M. Holmes. Have practiced medicine six and one-half years. Have been in Denver over one year; attended Mrs. Barnaby; was called upon the evening 13th April to Mr. Worrell's about 8; found two patients. Both were vomiting, weak pulse, excessive thirst and burning in the stomach; both suffered diarrhea and purging; treated the cases for irritant poisoning, as they had been vomiting for nearly two hours. Dr. Griffith came about half an hour after and stayed all night. The patients were very much de-

pressed and the pulse was very feeble; attended them from Monday until Wednesday night. No symptoms other than those of an irritant poison were present as far as I could tell. Mrs. Worrell was the other lady I treated; she gradually gained strength after midnight, while Mrs. Barnaby remained very much depressed. As I suspected irritant poison, made inquiries of each member of the household; they said they knew of nothing except some whiskey of which Mrs. Barnaby said she had taken two tablespoonfuls and made into toddy; examined the inscription and tasted its contents; at once suspected something was wrong; took out some of the contents in two different bottles and sealed up the remainder in the original bottle with a Knights Templar charm on my watch chain. Dr. Griffith was present. We each took some of the contents; took a two-ounce bottle full and Dr. Griffith about an ounce; gave the original bottle, sealed, to Mr. Worrell. Later on gave it to Dr. Sewall. The seal was intact; noticed the inscription on the bottle the first time I saw it; it was written with a lead pencil.

The autopsy was performed by Dr. Bucknum. The condition of the body was noted and the viscera carefully removed and washed with water taken from the hydrant and then carefully sealed. We asked the coroner to take the bottle, but he declined. It was then given to I. N. Rogers for safe keeping. It was sealed immediately after it was placed there. It was never left open while in Rogers' office; saw the coroner before the autopsy; requested him to hold an inquest

as we suspected poisoning. He declined, as he said too many had already been held, and that unless we could fasten the crime on some one he would not hold it. He also told us that a chemical analysis would be very expensive, and advised us not to go into it.

In the light of all I have heard and seen, the cause of death was poisoning by arsenic.

Cross-examined. The immediate cause of death was congestion of the lungs. Both lungs were congested.

It is not unusual to find congestion of those organs in arsenical poisoning. Arsenic always affects the stomach, the alimentary canal, particularly the duodenum and rectum and sometimes the lungs. Mrs. Barnaby said she used about two tablespoonful of the whiskey.

They had severe pains in the stomach, and there was violent retching. Toward morning Mrs. Worrel became comparatively easy, but she was very nervous. Mrs. Barnaby continued very much depressed. At 2 o'clock Mrs. Worrel was much better, but I did not consider her out of danger. I saw the viscera that was removed and the heart. There was blood in the right ventricle of the heart. The cavity was filled mostly and extended up into the pulmonary artery, having coagulated there. In my opinion the clots in Mrs. Barnaby's heart were formed before death. Arsenic produces effects which tend to form these clots in

the blood. I believe arsenic to have been the indirect cause of her death. The symptoms of her death were the secondary symptoms of arsenic.

Dr. Samuel A. Bonesteel. Have practiced medicine about 19 years; know Mrs. Worrell; attended her on April last, at the residence of E. A. Worrell, Jr. Both Mrs. Barnaby and Mrs. Worrell were attended by me. Mrs. Worrell complained of pain in the stomach. Her pulse was normal and her temperature 85. She was nervous and restless, but was improving. Mrs. Barnaby had cold skin; her pulse 90, temperature 98, and she complained of a weak stomach; noticed her right arm was weak, and was told that she had been paralyzed; attended her until her death. She was nervous with cold skin and irritant stomach. Mrs. Worrell was under my care until she left Denver; didn't think she entirely recovered. She was weak and suffering from the shock. On Friday Mrs. Barnaby developed symptoms of congestion of the lungs, which were rapid respiration and murmur in the lungs; signed the death certificate. The cause given was congestion of the lungs; signed the certificate, as Mrs. Barnaby's friends were anxious to take the body East, and I supposed the doctors who held the inquest had all the necessary parts of the viscera in their possession. Her death, in my opinion, as gathered from the evidence and from what I know of the case, was caused by arsenical poisoning.

December 11.

The defense admitted, after consultation with Dr. Graves, that he forwarded to her in January two packages of medicine to the office

of the Schermerhorn and Worrell Investment Company, 1525 Arapahoe street, Denver. They admitted that the box presented in evidence was that which contained the bottle with the well-known inscription, and that the stamps which had been preserved and transferred to Mr. Schermerhorn's son, who kept a collection, were the stamps which were attached to the outer wrapper of the bottle which was delivered to Mrs. Barnaby.

Dr. Bonesteel (cross-examined). Went to the Worrell house on the night of April 15, and was in attendance until Mrs. Barnaby died and afterwards gave Mrs. Worrell permission to get out of bed on Thursday evening. She was not at all well and was nervous. The nurse said Mrs. Barnaby vomited only once or twice on Wednesday and had no diarrhea. On Friday afternoon both her heart and lungs were badly affected and she became worse. The ordinary period of life after a fatal dose of arsenic is 24 hours. Two grains will kill most people. The symptoms which Mrs. Barnaby showed were those of some deadly influence which was overwhelming the vital powers. Had I not known the history of the case I probably would not have suspected poison. There did not seem to be any inflammation present caused by the congestion.

Dr. Griffith. Reached the house of death half an hour after Dr. Holmes. Mrs. Barnaby was in a depressed condition; her symptoms were as testified to by Dr. Holmes. Mrs. Worrell showed the same, but hers was not so aggravated. They complained of a burning sensation in the throat and great thirst; was present while Dr. Holmes sealed up the bottle. Had obtained a portion of the fluid; treated the two women for an irritant poison. There were no

symptoms of any lung or heart trouble in either. Mrs. Worrell told me she had taken a drink of toddy from fluid out of a bottle. The viscera was placed in the jar and it was sealed. Both jar and contents were washed carefully before the sealing operation; was present when the jar was handed over to Prof. Headden. The jar was sealed five or ten minutes after the viscera was placed inside of it. When the jar was handed to Headden the seals were not broken.

Dr. H. H. Bucknum. Have practiced nine years and been in Denver four years; made the autopsy; from the testimony I have heard, and from my knowledge of this case, the immediate cause of death was congestion of the lungs; the cause which produced the cause of death was arsenic.

Dr. Eskridge. Have practiced 17 years; from the testimony I have heard the death of Mrs. Barnaby was caused by arsenical poisoning.

The secondary effects of arsenic are commonly upon the nervous system. A fatal dose varies from two to four grains. A person usually lived two hours to 24 after a fatal dose of poison. The longest case was two years. There are numerous cases where persons lived two or three weeks. The usual symptoms are nausea, vomiting, burning pains in the stomach and throat; vomiting first of the contents of the stom-

ach, then of the bile and last of mucus and blood. Diarrhea follows later on. The surface of the skin is cold and the pulse is rapid. In cases of death within two hours there is much increased prostration, and if the person doesn't go into convulsions he goes into a comatose state and dies of the shock. After the acute symptoms are over the symptoms usually change. The pulsations are quiet, rapid and of irregular volume. Had examined Mrs. Worrell the previous day and the day before in accordance with the agreement between counsel. Eczema appears on three toes of the left foot. The sense of touch on these toes is perverted. She cannot feel a touch at first, but if the pressure is continued it becomes perceptible. In making the experiments Mrs. Worrell was blindfolded after she had pointed out the area said to be affected. She could not distinguish between hot and cold at some points. On part of the right foot there is partial loss of the sense of touch. Mrs. Worrell was made to point out the area so that when she was blindfolded there could be no chance for deception by her. The nails on three toes are considerably thickened. In my opinion the cause of these symptoms is inflammation of the nerves, and the cause of the inflammation was arsenic. There were but three causes which could make such symptoms—syphilis, alcohol and arsenic.

Roy Carrier. Am stenographer; in March and April was employed in the office of Schermerhorn & Worrall; went to the postoffice to get the package for E. S. Worrell, Jr. It was

wrapped in ordinary brown paper, and was addressed to Mrs. J. B. Barnaby, care E. S. Worrell, Jr., 1525 Arapahoe street, Denver, Colo., and had upon it the words "merchandise only;" took particular notice of the stamps, and of the cancellation which had the word "Boston" on them; took the package to the office and gave it to Mr. Worrell in person or put it on his desk; saw the package opened in the presence of Mrs. Barnaby, Mrs. Worrell, young Mrs. Worrell and Mr. Schermerhorn about 12 o'clock same day. The package was fastened with a string, and inside was a wooden box wrapped in white paper, and inside was a bottle which was packed in excelsior; identify the bottle in court as the same which I took from the box; noticed the inscription and read it aloud to Mrs. Barnaby. It was, "Wish you a Happy New Year. Please accept this fine old whiskey from your friends in the woods." She was standing near my desk and smiled when I read the inscription. Mr. Schermerhorn took the bottle from me and passed it to Mrs. Barnaby and to Mrs. Worrell, then he took it from them and repacked it. Worrell said he was going to the house and could take the package up with the groceries. Schermerhorn tore the stamps from the wrapper and put them in his pocket. After Mrs. Barnaby was taken sick, Mr. Worrell asked me if I would not try to find the wrapper with the address; hunted through the ash barrel and waste basket and could not find it.

Cross-examined. Am brother-in-law of E. S. Worrell, Jr.; re-

member that some time in January two pound boxes of smaller size than this were received at the office, which were for Mrs. Barnaby; do not remember of reading the addresses,

(The box was brought in from the office of Superintendent McParland of the Pinkerton agency, who had been its custodian. After the outer wrapper was removed, a wooden box was disclosed, with a sliding cover about six by four inches in dimensions, which was stamped in bold character with the inscription on three sides: "Lebig's Extract of Meat." Among other words upon it was the inscription: "Superior Quality," and "One Dozen Two Ounce Jars.")

Carrier. Don't remember the size or the character of the handwriting of the inscription, but thought it was made in ink; did not remember Mrs. Worrell receiving any letters prior to the reception of the package. Mr. Schermerhorn took the stopper out of the bottle and Mr. Schermerhorn, Mrs. Barnaby and myself smelled of the contents; do not remember whether Mrs. Barnaby asked us to take a social sip or not.

Mr. Schermerhorn took out the cork without any instrument; put the cork back in the bottle myself and wrapped it up; never saw it after that day until after it was sealed by Mrs. Worrell at the latter's house and was brought back to the office; did not know what hands it had passed through in the intermediate time; no one drank of its contents in the office; was at the house when the samples were taken out by Dr. Griffith and Dr. Holmes; got the sealing wax myself at a neighboring drug store, which Mr. Worrell melted, and Dr. Holmes sealed it with the Knights of Pythias seal on his watch charm. (Shown the original bottle, he said that its

or remember the stamps that were upon the boxes. Had never seen stamps like those on the box, and my attention was attracted by their peculiarity.

contents looked like those which he saw in the office when he undid the package.)

John R. Schermerhorn, Sr. Knew Mrs. Barnaby; first met her at the Union Depot in this city January 10, 1891, after her return from a tour of the Pacific coast. She stopped at my house at that time with Mrs. Worrell, Sr. While there she received two small packages which were confined in tin boxes; told me they were from her physician, Dr. Graves. (*The defense objected to this evidence, as the defendant was not present at the time this statement was made. The COURT sustained the objection.*) There were two bottles of medicine which she had received for some trouble she had, but which she did not indicate; saw the bottles at this time, but did not notice the postmark.

Mr. Macon. The defendant will admit that he sent Mrs. Barnaby two packages of medicine in January.

Mr. Schermerhorn. Saw Mrs. Barnaby on the evening of April 8 on her arrival from the Pacific coast. Mrs. Worrell had arrived before that and had stopped at my house. The package came to

my office before Mrs. Barnaby's arrival. Supposed that it was another package of medicine. It remained on my desk for several days; took particular notice of the stamps and their large denomination. The night she arrived I told her that there was a package down in the office for her. She said, "I wonder who it is from?" Told her it was stamped from Boston and there was 95 cents postage on it; said she could not imagine whom it was from; told her I thought it was a package of medicine, and she said that she would be down in the morning and get it; went home that night to the residence of E. S. Worrell, Jr., with Mrs. Worrell, Sr., and came down to the office the next morning at about 11; took the package from the desk, handed it to Mrs. Barnaby and said: "Here is your package." Took off the outer wrapper, I said to Mrs. Barnaby: "You don't want those stamps do you? My son John is making a collection; he would like them." Mrs. Barnaby said "You can have them," and I tore off the stamps, then cut the string, opened the box, removed the package around the bottle and drew it out; took the bottle, and holding it up, read the inscription. After reading it, said to Mrs. Barnaby, "This has come rather late for New Year's." Took the stopper out of the bottle and smelled of the contents; said to Mrs. Barnaby, "I'm not feeling well today, and if it was blackberry wine I would take some of it." Nobody in the party took any of the liquid; told Roy to put the black bottle back in the box. E. S. Worrell, Jr., came in later and

said that he had his horse and buggy outside and would take the package up to Mrs. Barnaby. Did not see the package in the office after that, except after Mrs. Worrell, Sr., and Mrs. Barnaby were taken ill. Mr. Worrell, Sr., brought it to the office, sealed and wrapped it in a new wrapper, and afterwards Mr. Worrell delivered it to Dr. Sewall the same day, having, however, locked it up in the safe in the meantime. The package was opened in the office on a Friday. She was taken sick Monday night. Put the stamps in my pocket and gave them to my boy, John, who put them in his drawer at home. Some time between Tuesday and Wednesday got them back again. The stamps in evidence I identify as those which I tore from the package. After Mrs. Barnaby died Dr. Graves was at my office. He said, "I am the physician of Mrs. Barnaby, and it is a very sad case." Mr. Worrell came in later and Dr. Graves introduced himself to Mr. Worrell. Mr. Worrell said: "We have been waiting for you and you are behind time." Dr. Graves said: "I missed every connection and was attacked with the grippe in Chicago." He seemed nervous and excited, and deeply affected and had tears in his eyes. Graves said to Mr. Worrell: "No one knows how much I have lost, and what a dear friend she was to me. I can't think who could have done such a thing as this. It must have been the Bennetts." Dr. Graves asked Mr. Worrell if he could do anything. Worrell said, "No, sir, everything has been done." Dr. Graves wanted Mr. Worrell to endorse a check

for him, but Mr. Worrell didn't seem to be inclined to do it. Dr. Graves asked where the Jacobson block was, as he had a friend there who would accommodate him. Mr. Worrell said to Graves as he was going out, "There must be very few people who can know where Mrs. Barnaby's whereabouts were," and asked Dr. Graves if he could think of any person who would be likely to know. Dr. Graves first mentioned the Bennetts, and then Lord & Taylor, wholesale dry goods dealers in New York. About 5 saw Dr. Graves approaching the office with a stranger. Both passed by the door, repassed the office and went into Tortoni's restaurant.

Cross-examined. Dr. Graves, in his conversation with Mr. Worrell, spoke about the expenses incident to the sickness and death of Mrs. Barnaby; do not remember about the stamps received on the other two packages in January, this was the first time I attempted to preserve them; do not think that the cork was fastened tightly in the bottle; did not notice any leakage; do not think that Mrs. Barnaby smelled the contents of the bottle.

(The bottle was passed to witness; he thought the odor was precisely like that which he detected when he uncorked the bottle.)

Mr. Macon admitted the delivery of the packages sent in January, and also this last one April 4.

John Schermerhorn, Jr. Received stamps from father which I carefully preserved in a drawer; delivered them to father April 14 or 15. They had not been disturbed in the meantime.

Frederick Thomas. Am a member of the firm of Schermerhorn & Worrell; Dr. Graves visited the office on Friday or Saturday of the week succeeding Mrs. Barnaby's death. He seemed very much excited and nervous, and remained about half an hour. Saw Dr. Graves and a stranger pass and repass the office and go into Tortoni's, after he had agreed to come back to the office at 5.

December 13.

Mrs. Edward S. Worrell, Jr. First met Mrs. Barnaby in January last at my wedding in Denver; next saw her the evening of April 9, when she returned from San Francisco. She remained at our house until the time of her death; heard that a package had arrived for Mrs. Barnaby at my husband's office. Mr. Worrell asked the servant girl if she had taken the package from the buggy, and she said she had; did not see the package. Mrs. Barnaby, at the lunch table, said she had received a bottle of whiskey; accompanied the party comprising Mr. and Mrs. Worrell, Sr., and Mrs. Barnaby, to Mr. Worrell's ranch on April 13. We went to Morrison by train and took a carriage from there to the ranch, about five miles. Mrs. Barnaby was very well and ate a hearty meal. We spoke about it. We arrived home about 6 p. m. My husband and myself went to Mr. Worrell's office after he had put Mrs. Barnaby and Mrs. Worrell, Sr., on a car.

When I got home Mrs. Worrell was in the bathroom and Mrs. Barnaby in one of the bedrooms. Mrs. Worrell said that Mrs. Barnaby had mixed a toddy

and it had made them both sick. Mrs. Worrel was in great pain and said: "I am burning up; I don't believe that whiskey was all right." Mrs. Barnaby said: "Nonsense. I took some and am all right." Shortly afterwards found Mrs. Barnaby in the bathroom very sick. She said: "I am burning up and in such awful pain;" asked what caused it and she said: "I, too, drank some of that whiskey." Asked where the bottle was, Mrs. Barnaby told me that it was in her trunk in the hall closet; got the bottle, read the inscription and asked Mrs. Barnaby if she didn't recognize the writing. She said she did not. Got her to bed and sent at once for the doctor. She soon became unconscious. This bottle I identify as the one I brought to Mrs. Barnaby; asked Mrs. Barnaby if she thought the Bennetts sent the bottle, and she said no. Asked her if she thought Dr. Graves sent the stuff, and she did not answer. Mrs. Barnaby died at my house on Sunday, April 19. Dr. Graves came to the house on Friday after Mrs. Barnaby's death; went down stairs and met him. I said: "Where have you been? We have waited since Wednesday." He made a confused explanation that he had missed all the connections and had a narrow escape from the grippe at Chicago. I said: "You knew Mrs. Barnaby was dead." He replied, "I received the telegram notifying me to that effect a little while ago. I suppose she died of a shock of some kind. Mrs. Graves and myself thought that as soon as we heard that she was dead." I said, "No doctor, it was something more

dreadful than that, and if you will sit down I will tell you about it."

I then told him of the story of our visit to the ranch, the drinking of the contents of a bottle that came from Boston, and which we supposed contained whisky; about the awful symptoms following the draught, Mrs. Worrell's suffering and Mrs. Barnaby's death, and that the doctors when they came said there was reason to suspect poisoning. Dr. Graves was very nervous and excited, and exclaimed, "It is dreadful; I don't know what to think of it." When I told him about the bottle coming by mail, he said: "That's a direct violation of the law." He asked if I knew where it came from, and I told him that, fortunately, the stamps had been saved and contained the Boston cancellation. Told him about the inscription on the bottle, and told him that we first thought of the Bennetts, and he said: "Oh, yes, the Bennetts; they are terrible people. They must have done it."

Dr. Graves said: "I have lost a good friend; she was one of my best friends;" said he must go downtown and make arrangements with the undertaker; told him the arrangements had been completed; that Mrs. Conrad had been telegraphed, and was already in town. He said: "I must go down to see her;" told him she would be at my house to luncheon that day and he could see her then. He said he did not know if he could get back, as he had an engagement with a friend to whom he was under deep obligations. He did not return to the house. Mrs. Worrell, Sr.,

said to Dr. Graves, "If you go on tonight I will get ready to go," but the doctor thought she ought not to go, seeing she was suffering so much. I asked him if he had not sent Mrs. Barnaby medicine to that address. He seemed confused and said: "Yes, but I am turned all around today." Next saw him at the depot that evening when the party was leaving. Clark, Mrs. Barnaby's nephew, introduced him to Mrs. Conrad. He did not seem to catch the name and stammered something to that effect. Clark said: "One of Mrs. Barnaby's daughters." The doctor said: "Oh, yes, yes, ladies, you must excuse me, I am not myself. This is such a great shock. You don't know what a friend I've lost." Speaking of Mrs. Worrell's weakness, Graves said he was a physician, but was sorry he did not have any medicine. He mentioned whiskey. "Oh, don't say whiskey to me," said Mrs. Worrell. "It makes me nervous." At lunch one day the money question came up, and there was some talk of Mrs. Barnaby buying \$5,000 or \$6,000 worth of property. Mrs. Barnaby said: "I don't know whether I have that; don't know what I have." She said she wished she had a power of attorney to sign her own checks.

Mr. Macon. How did you come to ask Mrs. Barnaby about the Bennetts, what had you heard about the Bennetts? Because I understood when Mrs. Barnaby returned Friday after learning of the arrival of the package, she thought the whiskey might have been from the Bennetts. Then you asked her if she thought it might have come

from Graves. Yes. Explain why you asked this question about Dr. Graves and the whiskey. I know that Dr. Graves had complete control over her affairs and might have had undue influence, and she had spoken of the treatment in California she got from him about money, and because we had discussed it among ourselves. What was the nature of Mrs. Barnaby's dissatisfaction with Dr. Graves' management, did she say? Wrote to him to send her her will, as she wanted to make some changes in it. He wrote that it could wait until she got back, and declined to send the will. Then she said she didn't like the way he did about sending her money. He sent her checks and she had hard work to get them cashed, being a stranger in California. He didn't send her money often enough, either.

Mrs. Nancy B. Allen. Am the grandmother of Mrs. Worrell, Jr. Was called to her house April 13; found Mrs. Barnaby and Mrs. Worrell, Sr., very sick and both vomiting. They complained of thirst and said they were all on fire. Their bodies became after a time very cold, the numbness extending through arms and legs. Mrs. Barnaby was very cold and her nails were purple. On the advice of the doctor I rubbed her arms and legs, and it was fully an hour before I could succeed in getting any perceptible circulation. The palpitation of the heart could be hardly detected. Both patients wanted water all the while. Mrs. Barnaby did not make as much noise, groan as much as Mrs. Worrell, but she showed

symptoms that were just as serious.

Mrs. Barnaby, in her weak voice, said: "Keep this still. Do not let the papers get hold of it. As soon as I am able to go East, I shall put this into the hands of the best detectives. Some one has been seeking my life."

Have you any enemies? I asked. "I don't know that I have," she replied; "but yet, I may have in the person of Sallie Hanley, the last maid that I had. Dr. Graves employed her for me, and she was not a lady, and I discharged her. Dr. Graves wanted me to go to Cuba to spend this season, but I desired to go to California. I wrote to Mrs. Worrell, Sr., if she would go with me. She said she would go with me, and here we are." I asked her if anyone would be benefited by her death. She replied that she left Dr. Graves \$50,000 in a will. I said I thought that was a very large sum to leave to one person. "Yes," she responded, "it is a large sum and I changed it in my new will."

Inquired if the doctor knew she had made him a beneficiary. She said the doctor knew all about it. She said she did not have as much confidence in him as she previously had had. The medicine he had sent her had not done her the good it formerly had. She said his treatment of her in California was not at all satisfactory. She expressed herself as much displeased. At one time she said they had only 50 cents between them.

Met Dr. Graves at my granddaughter's house after the death of Mrs. Barnaby. She asked him why he had not come sooner,

and he said he had hurried along as fast as he could and was delayed. He missed connections, he said. He did not mention that he stopped off at several places to visit friends. He seemed very much surprised when we told him Mrs. Barnaby was poisoned. Believed then that the man wasn't honest, because he wouldn't look me in the eye. Never believe a man innocent when he won't look me in the eye. His hands twitched and his face was contorted. He said, in confusion: "I can't think; I can't think; I can't think." He said it three times and added: "I must get out into the open air so I can think." Mrs. Worrell, Sr., came in and he asked her if she had been sick too. "I was at death's door," she responded. Heard my granddaughter repeat the story of the reception of the bottle, the drinking of the poison, and the sickness that ended with death. She said that when the supposed whiskey came, Mrs. Barnaby thought that the Bennetts might have sent it. "Yes," he said quickly, "they must have sent it. They and Mrs. Barnaby had a terrible quarrel; where is the body?" Told it was at the undertaker's, and he said he must go and see it. Told that Mrs. Conrad was also in the city; he acted surprised and confused and asked: "What! is she in the house?" "No, she is at the hotel," my granddaughter replied. He said he would go and see her at once, and promised to return and see us, but he did not do it. He didn't keep his word.

Cross-examined. Had a talk with the deceased about her prop-

erty. Was certain from what Mrs. Barnaby said that she was subject to Dr. Graves' orders in all financial matters, and I told her that she ought to manage her own property; that she shouldn't trust her money to any man.

Mrs. Hattie A. Carrier. Am the mother of Mrs. E. S. Worrell, Jr. Saw a package at Mr. Worrell's office for Mrs. Barnaby; asked Mr. Worrell why he didn't send it to Mrs. Barnaby. He said he wasn't sure of her address, and that she was expected in Denver soon, and he would keep it until she came.

Saw Mrs. Barnaby at my house the Sunday following her arrival. She said she had been greatly annoyed about money, and that at one time she had only 50 cents in her pocket. Asked her why she didn't have certified checks or a letter of credit. She said Dr. Graves sent her all the money she had, and she had to await his pleasure.

She was also annoyed at Dr. Graves for not sending her the will she wrote him for. She said she told him she wanted to change it, but he wrote that she could do that just as well when she got home. Next saw Mrs. Barnaby the night she was taken sick. On Tuesday, she said whoever sent that bottle intended to take her life, but she said not to say anything, as she didn't want the matter to get into the papers. She said, "When I get to New York I am going to take that bottle to the most expert detective I can find, and have him search the matter to the bottom." She then said, "I don't know why I took that stuff, as Mrs. Worrell told me there was something wrong with it when

she took it." She said it left a very bad taste in her mouth. Friday morning it was with great difficulty that she was enabled to breathe. She said she felt very much worse. Asked her if she thought the Bennetts could have sent that bottle to her. She replied: "Oh, no, no, no; they would not have done it. They and I were the best of friends. I intended to spend next summer with them. I wonder if it can be possible that Dr. Graves could do such a thing?" I am sure I don't know, Mrs. Barnaby, I replied. Did you remember him in your first will? "Yes," I left him \$50,000," was her answer. Did Dr. Graves know it? I asked. "Yes," he saw the will," she answered. Saw Dr. Graves the evening the body was sent East. The doctor was introduced to Mrs. Conrad, and he said: "What's that? I didn't understand the name." Then he said: "You must excuse me, I am not myself at all; I am dazed. Excuse me." Then he was introduced to me. He called me Mrs. Worrell. I said, no, this is not Mrs. Worrell, doctor. I am Mrs. Worrell, Jr.'s, mother, and there sits Mrs. Worrell, Sr. "Yes, please excuse me," he said. Then he turned to Mrs. Worrell, Sr., and asked her if she were sick. She replied she was sick, and had been much more ill. "Well," said the doctor, "I have nothing with me that could be used for medicine except a bottle of whiskey in my grip." Oh, don't mention whiskey to me," she exclaimed, throwing up both hands. "Well, I beg your pardon," he said; "this has dumfounded me. I don't know what to think." Then

he turned and spoke to Mrs. Conrad. "Mrs. Conrad," he said, "you look like your mother. She was a good friend to me, a very good friend." At this, Mrs. Conrad turned away.

Mr. Macon. Did you not discuss among yourselves—you and the Worrells—about the probable criminal? Yes, we had several talks about it. Whom did you all suspect? Well, the first thing was to discover a motive. We thought that Dr. Graves was the only one who would probably have a motive for doing such a thing.

Of all the thousands of people in the East, why did you single out this person as the probable guilty party? Because he was the only one whom we thought might have a motive for the deed.

Edward S. Worrell, Jr. Have lived in Denver four years; am secretary and treasurer of the Schermerhorn & Worrell Company. First met Mrs. Barnaby in the fall of 1877, when she was in Chester visiting my mother. She had been there quite a number of times while I lived there. She met my mother in the summer of 1877, while she was traveling in Europe. Saw her for the first time in Colorado last January.

Next time was on April 9. She and my mother came to my house from Mr. Schermerhorn's. Don't know that she was expected on that day. When she came in that night I said: Hello, you made pretty quick time getting here didn't you? Got through with the doctors so soon? She said, "Yes, they are frauds, and I left them." Asked if she had paid them, she said,

"No, they charged me \$100, but I didn't pay it. Dr Graves kept me so short that at times I didn't have enough to get a plate of bread."

She asked me what interest she could get on her money in Denver; told her that she could get 7 or 8 per cent. She asked me if I would take charge of her business. I said, under certain conditions. She asked if I would take it and speculate with it as with my own. I said that I would take \$50,000 and speculate with it, if she wished, and the remainder I would put out in first mortgages. She asked if she could have the mortgages in her name and have the interest sent to her. I told her they would have to be in her name. Then she said: "Eddie, could you come East with me when I go, and straighten out my affairs." Then she wanted to know if she couldn't have the power of attorney to sign checks. She said Dr. Graves had never furnished her with a statement of her affairs.

Got a notice from the post office on March 31 saying there was a package at the office for Mrs. J. B. Barnaby in my care. Forgot all about it for some days. April 2 gave the card to Roy Carrier and told him to get the package. He brought it to the office and placed it on my desk.

She and my mother came to the office on Friday morning. After receiving them I went to the rear of the office. I heard just enough of the talk to know that there was a bottle in the package. Mrs. Barnaby asked me to take it home and I said I would.

Next day when I got home at noon I took the package out and took it into the kitchen, where I removed the wrapper and placed the bottle on the dining room mantel. Called Mrs. Barnaby's attention to it. Don't remember having seen it again until the night she was taken sick.

My wife came in and said: "Your mother is very sick." Went into the bathroom and found her vomiting and in great distress. She said: "It was that vile stuff in that bottle." I went to the drug store and telephoned for Dr. Bonesteel, and was told that he was in Chicago. They said Dr. Holmes was attending to his practice; telephoned him. When I got home my wife told me that Mrs. Barnaby had been taken sick, too, and said: "It must have been that whiskey."

Dr. Holmes arrived about 8. He at once suspected poison. When Dr. Griffith arrived, they asked for the bottle, and tasted and smelled its contents. They at once suspicioned that it wasn't all right, and sent for some wax, and the bottle was sealed by Dr. Holmes in the presence of myself and Dr. Griffith. Before they sealed it both took a sample of its contents.

Had a great many conversations with Mrs. Barnaby as to what she craved. She would ask me to get things for her. I asked her Tuesday and Wednesday if there was not something wrong, and if I should have Dr. Sewell examine the bottle. She said, no; when she went to New York she would have it analyzed. On Tuesday, at her request, I wrote a letter for her to Dr. Graves. Was at the house when she died. Friday I telegraphed Dr. Graves

and Mrs. Conrad. This copy is the telegram I sent Dr. Graves. It ran as follows: "Mrs. Barnaby is dangerously ill. Come if you wish to see her alive." After Mrs. Barnaby died, sent a telegram to Dr. Graves as follows: "Mrs. Barnaby died at 2 o'clock this afternoon." On Monday, about 10 o'clock, received the following telegram from Dr. Graves:

Boston, Mass., April 19, 1891.
To Mrs. J. B. Barnaby, care E. S. Worrell:

"Keep up good courage. I leave at once to come to you. Was in Boston when the telegram arrived."

On Thursday, April 23, sent the following telegram to Mrs. Dr. Graves:

"Dr. Graves has not arrived. We are waiting for him. Can you explain."

In answer to this received the following from Mrs. Graves:

Providence, R. I.

"Letter received today; expected to reach Denver tonight. Probably missed connection at Chicago."

The following telegram also came:

"Boston, Mass., April 20.

"Dr. Graves started Sunday night. Hold remains till he arrives."

"Mrs. T. T. Graves."

Dr. Graves came to the office Friday morning; did not tell Dr. Graves the cause of death by wire. I asked him why he was so late. He replied that he had missed connections, and besides, had an attack of the grip in Chicago. He said he had been up to my house and had heard the cause of death. I then said: "Doctor, do you have any idea

who sent this bottle?" Dr. Graves replied: "I have no idea unless it was the Bennetts. The Bennetts and Mrs. Barnaby had a great row. Mrs. Bennett prohibited Mrs. Barnaby ever to enter her house again. Sallie Hanley can tell you all about it. She knows the details of it." "Now, doctor, this thing figures down to a very fine point. Some one who knew that Mrs. Barnaby's address was in my care must have sent that bottle. Who knew that address?" He answered. "Well, I knew it, and the Bennetts knew it, and Charles Robinson of Glen Falls knew it, and Mr. Sage of Blue Mountain Lake knew it, and—oh, yes, Lord & Taylor of New York knew the address. Yes, and Mrs. Weed of Fourteenth street, New York, knew how to reach Mrs. Barnaby by mail." I said: "Some one who knew the address must have sent the bottle. Are those all the names you can give me?" He answered: "I can't think; I can't think; I'm dazed, but my wife'll know. I'll have to consult her. She sometimes does some of my business for me. I'm dazed and cannot think, and will have to see my wife." I then told him what preparations had been made for an investigation and how the bottle had been sealed; arrangements made for its analysis; of the autopsy held and the statements of the three doctors; of the preservation of the viscera, etc. He listened to it all and then said he supposed there were a good many bills to be paid. "I left home in such a hurry," he said, "that I only thought to bring two checks." I informed him all the bills had been paid. He appeared to be

very much excited and nervous. Perspiration stood out on his forehead, and he said, with tears in his eyes: "Mrs. Barnaby was a dear friend of mine—a very dear friend. She was the best friend I ever had." When he told about the row alleged to have occurred between the Bennetts and Mrs. Barnaby, great drops of perspiration stood out on his forehead and face. He took his hand and wiped off the sweat from his forehead and ran his fingers through his hair. He appeared very nervous. Then he said he needed money. He had but \$20 or \$30 about him. He said if he could get a check cashed he would be all right. I directed him to the Jacobson block, whither he desired to go. He asked if there was anything he could do, and I told him that all had been done, that tickets had been bought over the Burlington. He left saying he would return. Shortly after he came in and said, "I've got my check cashed, but I don't know that I have any right to settle any bills." Mr. Willis Kerr, an attorney, was in the office at the time, and I asked him if the power of attorney did not cease with the death of the person who gave it. He said: "Yes; it does." Then he asked Dr. Graves who was the executor of Mrs. Barnaby's estate, but the doctor did not know. He said: "Mrs. Barnaby left a will and left most of her property to her daughters, I think." I said: "There is a second will made by Mrs. Barnaby." The doctor started and said: "Oh, yes, yes! There is a second will, so I've heard." I did not see him again until at the depot, where we had a conversation on

the car. He said: "Mr. Worrell, I will write you fully; Mr. Worrell, I will write you fully; Mr. Worrell, I will write you fully. I will write you about all these things. My head is so full that I can't think, but I'll write fully."

I received the bottle from Dr. Holmes after he sealed it. Took it to my office and placed it in the safe. The next Monday Dr. Holmes and I took it to Dr. Sewall. Drs. Holmes and Griffith and myself went to Coroner Walley on the day after Mrs. Barnaby's death; told him of the circumstances attending the death and our suspicions, but he declined to act. The autopsy was held at Rogers' undertaking establishment on Monday afternoon. The viscera was taken out and washed and placed in a glass jar; took it to Mr. Walley but he declined to receive it. Subsequently I turned over the jar to Dr. Headden, and at that time the seal had not been disturbed.

Dec. 13.

I sent to Mrs. Conrad a telegram:

"Your mother died at 2 o'clock this afternoon. Come at once and wire me in advance." And on Sunday night: "Must see you before the remains are embalmed. Come at once."

Also sent a dispatch to Mr. Conrad, stating more in detail the cause of death. On April 20 Mr. Conrad wired me as follows:

"Mabel left on this morning's train for Providence, where she expects to meet remains. Would take four days for me to reach Denver. Have careful investigation made. Should I send money for expenses?"

I answered: "Having investigation made today. Will have remains embalmed and go with them to Providence. Dr. Graves wires he will arrive Wednesday night. Shall I wait for him?"

Received in reply: "Think it would be well to wait for Dr. Graves."

Mrs. Conrad arrived Thursday morning.

Cross-examined. Mrs. Barnaby said she wrote to Dr. Graves when she was in Chester, requesting him to send her her will. Replied he would send it when she got to California. She did not like to wait until then and so made a new one before she left Chester and wrote Dr. Graves to that effect, telling him he need not send the old one. Did not know father or mother were beneficiaries by that will, or that Dr. Graves got \$50,000 in the first will and was cut down in the second.

The doctors asked me if I knew any one who might be responsible for the poisoning, and who would be benefited by the death of Mrs. Barnaby; knew that Graves was a beneficiary in her will and that he had charge of her property, so I suspected he might have done it.

Nellie Nelson. Was a servant at Mr. Worrell's. Remember going to the buggy for the packages. Was there the night Mrs. Barnaby took ill. She came down into the kitchen that night with two glasses and whiskey in them. She asked for hot water. There was none, so she poured in the cold water.

Cross-examined. Am 16 years old. Do not know of my own knowledge the box I saw in the

kitchen was the box in the buggy. Mr. Worrell told me it was the same one. The box now shown me is the one.

E. S. Worrell, Sr. Live at Chester, Pa.; became acquainted with Mrs. Barnaby in 1877; came to visit my wife who met her in Scotland. The Barnabys visited us and we them at Providence. Remember Mrs. Barnaby's visit to my house last January. She said she was so glad I was willing to let Mrs. Worrell go to California with her; that she had got tired of maids; that she had one which Dr. Graves had sent here; she didn't like her

and sent her Lome; that she had written a letter to Dr. Graves that she was dissatisfied with Sallie, and said she left Dr. Graves \$50,000. She thought that was too much money, and she must change it. She said she wanted a statement, and that she had no money, except what he gave her.

She said Dr. Graves had threatened that if she did what he did not want he would put her under a guardian. She grieved over that. I wrote to Dr. Graves at her request requesting the return of the will. There is the reply Dr. Graves sent to that letter:

Providence, R. I., Jan. 5, 1891.

My Dear Friend—I returned from Newton tonight and found your letter. Mrs. Graves' mother is quite ill, and I shall have to return there to see her again tomorrow. It is too late for me to visit the vault to obtain any of your papers. So it will be best for me to wait until I hear you are safely settled down in some boarding place—Los Angeles. Then I can send anything that you want. The first \$5,000 was paid over to me and placed in the Rhode Island Hospital Trust fund, late this afternoon.

I enclose a check for \$600, payable to Mr. E. S. Worrell, in order that he may get it cashed for you without any trouble to you or any delay. My wife and myself join most heartily in lots of kind wishes for your safe journey, and a most happy and jolly trip. Very truly
T. Thatcher Graves.

Mrs. Barnaby still insisted on making a new will, saying, "What shall I do? Dr. Graves will not send back the will." I told her she could make another one and that it would make no difference about the first one. She said she could not go to California until she made that will and arranged with lawyer Rose to draw it up; was in the room where she was dictating until she began to speak of leaving something to my family. Mr. Rose asked me to step outside. In a few moments he came out and said, "Mrs. Barna-

by wants to leave something for the benefit of the Worrell family." I said it might just as well be put in trust if that was the case, and named several trust companies which I said would be safe. Some time after Mr. Rose came out again and said to me, "You may come in now." I went in and Mrs. Barnaby went on making bequests. Grace Church, Providence, she made the residuary legatee. Mr. Rose and my daughter Florence were the witnesses. Mrs. Barnaby next day gave me the will to keep.

She said she had to ask Graves for every dollar she got; told her that if she was not satisfied she had better put her money in a good trust company and she

could draw the interest of her income whenever she wished and let them manage the whole of it. That was all the advice I gave.

The Chester will was read. Its bequests were: Florence Conrad, granddaughter, \$5,000; J. B. Conrad, grandson, \$5,000; Ed Bennett, Adirondack guide, \$10,000; Fidelity Trust Company, for the benefit of E. S. Worrell, Sr., his heirs and assigns forever, \$10,000; Mabel Conrad, daughter, \$5,000; Maud Barnaby, daughter, \$5,000; Mr. Graves, friend, physician, business agent, \$25,000.

Cross-examined. While Mrs. Barnaby was in the Adirondacks she wrote inviting my wife to go to California with her; said she would pay all the expenses of the trip. When Dr. Graves didn't send the will she was very much annoyed. She said she wanted to make some changes; she had left \$50,000 to Dr. Graves and that was too much; told her a new will would redate all others, and that it was unnecessary that she should have the will, which Dr. Graves had. She did say once that "Dr. Graves will ruin me yet." She said Graves had told her that Mr. Barnaby, when he made his will, had left \$100,000 to a mistress of his.

Dec. 14.

Mrs. E. S. Worrell, Sr., Have been married 30 years and have eight children, the youngest 11 and the eldest 29. First met Mrs. Barnaby in Scotland, having been introduced by friends. Our relations were intimate and confidential since. Our families have visited each other in Chester and Providence since 1877. Went with Mrs. Barnaby by her invitation on the California trip. Prior to that time she had spok-

en of her business affairs and complimented Dr. Graves as a doctor, but not as to his management of the property. Later she spoke about her dissatisfaction with the maid chosen by Dr. Graves and also in regard to Mr. Barnaby's mistress to whom he left \$100,000 in his will. Said she felt she had been imposed upon by Dr. Graves; also expressed dissatisfaction with the tardy way in which Dr. Graves sent the checks which she had great difficulty in cashing while in California. I sent Dr. Graves letters at the instance of Mrs. Barnaby, apprising him a day ahead as to our movements.

Dr. Graves knew when we were coming to Denver. She expressed her dissatisfaction as to the maid, who, she believed had been acting as a spy in the Adirondacks and had circulated untrue stories about her. She also spoke of having left \$50,000 to Dr. Graves in her first will, which she thought was too much, she thought it ought to be cut down to \$15,000, which was about all he had earned for his services. Said Dr. Graves would ruin her yet.

Mr. Stevens read a letter from Dr. Graves to Mrs. Barnaby:

My dear friend—You seem to be so alone during the holiday festivities that our heart goes out to you; have made a settlement with

Sallie, who was terribly disappointed at losing her place. She wrote to her friends that she would be all winter with Mrs. Barnaby; had paid her \$50 which was, under all circumstances, the best thing to do, and she promised to remain your friend. I tell you, my dear friend, I will never again recommend a maid to any person as a traveling companion. The trustees insisted that I should select some person as a maid and I selected Miss Hanley.

Returned to Denver and left Mrs. Barnaby in San Francisco. Mrs. Barnaby met a lady who told her of a treatment which she could give. I stopped at Denver in order to see my son. Mrs. Barnaby arrived about a week after. My son told me that he had notice of a package for her before she came and asked me what had better be done with it; told him that it would be better to wait until we knew a positive address; knew she expected some fur; thought it might be the fur. The day of the drive to the ranch we came back to the house feeling weary. Mrs. Barnaby said, "I am so tired; I will go and get some of that fine old whiskey. It is there in the trunk." Mrs. Barnaby went down stairs and she came up again with the glasses in her hand. I drank down my glass full and as soon as I had swallowed it I said "the vile stuff." Mrs. Barnaby never said a word. She just sat there sipping the liquor. In a little while she said, "I must say that it is not very good." Then I was taken violently ill. In a few minutes my son, Eddie, came in, and I told him of having taken a drink of whiskey. He said that I should not have done so before eating; continued to be very sick

and told him that he had better get the bottle and seal it up; was vomiting and retching before Mrs. Barnaby. Remember Mrs. Barnaby received a package of medicine from Dr. Graves while in Denver, which she carried with her to California. It was for rheumatism and memory, and she used it up during her stay.

Cross-examined. Never asked Mrs. Barnaby to tell anything of her relations with Dr. Graves. She told me she had always collected the rents of the property left by her mother, until Dr. Graves said that he might as well collect them, and after that time they remained in his hands the same as the rest of her property. Neither I nor my husband tried to advise Mrs. Barnaby as to a way out of her trouble with Dr. Graves. Mrs. Barnaby's heart seemed softened towards her family in California after she ascertained that Dr. Graves had deceived her about Mr. Barnaby's bequest to his mistress. On Saturday afternoon, after the doctor had said that Mrs. Barnaby would die, I asked her if I should notify Dr. Graves, and Mrs. Barnaby said no.

Mr. Stevens read to the jury this letter:

260 Benefit street, Providence. Oct. 7, 1890.

Mrs. J. B. Barnaby:

My Dear Friend—The executors, having learned from some one lately returned from Blue Mountain Lake or Glen Falls, that you

are talking quite seriously of purchasing a house or property under the advice or guidance of Edward Bennett (whom they questioned me very closely about), seemed to be determined to bring up the question of placing you under guardianship to avoid any complications of that nature with your property, now or in the future. I wish to explain what being under a guardian means. You could not sign a paper legally. You could not borrow money, you could have nothing charged more than a six-year-old child. You never could step foot again in the Adirondacks, for you could not even leave town, as you could not raise funds. You would have to live in your old house, for they said so, and they were there. Now, this is a very serious matter, Mrs. Barnaby, and you must fully understand and appreciate it in every way. Have no talk about the matter which may be used against you. I am ready and anxious to give up the charge of your property the moment you cease to do what I know to be best, and every step which I have taken was laid before the executors at the last meeting, and they not only approved of it all, but thanked me, and also approved of what I have laid out for the future. When you are dissatisfied a guardian will be appointed.

Very truly yours,

T. Thatcher Graves.

Mr. Pence read to the jury several letters from Dr. Graves to Mrs. Barnaby. That of Feb. 10 said: "Your last letter contains such a number of addresses and places to which you think of going that I am perfectly bewildered." It continued about a business matter and concluded with most friendly protestations of esteem. The second was March 9, 1891, and acknowledging one of Feb. 21. It told her that she need not worry about checks not reaching her. It referred to a paper enclosed to be signed, witnessed and returned. He endorsed a check for \$400, and said that more would be sent if needed. There was no reason, the doctor said, why she should be hampered. It concluded by saying that there was no reason she should hurry, and again impressed the necessity of sending full advice of addresses, so that letters might reach her properly. "Everything goes happily and well," it said.

Another letter spoke of several small matters, and said he wanted to know the amount of money required for tickets, etc. The executors of Mr. Barnaby's will, he said, had not met the previous week on account of a storm.

William H. Wood. Live in Providence and am an executor and trustee of Mr. Barnaby's will. Dr. Graves during 1890 and 1891 was acting under power of attorney to collect and receipt for all money paid by the executors on account of Mrs. Barnaby's claim. It was drawn by Ballou. The court gave Mrs.

Barnaby \$105,000. One sum and two or three small sums were paid to Mrs. Barnaby and the balance to Mr. Ballou or Dr. Graves. The first payment to Mrs. Barnaby was \$500 Nov 22, 1890. January 7, 1890, \$14,400 was paid Ballou & Jackson, and endorsed by them as her attorneys. The next check was Sept.

30, 1890, for \$5000 and was endorsed by T. Thatcher Graves as attorney. The next was Jan 1, 1891, for \$5000, endorsed by T. Thatcher Graves as attorney. The next March 21, 1891 for \$80,000, endorsed by T. Thatcher Graves as attorney. No receipt was received from Mrs. Barnaby.

Once Dr. Graves requested money and we said that Mrs. Barnaby had been drawing freely and he might wait until the first payment was due. He said that her house on Broadway was badly in need of repairs. That was the time he got \$5000. Dr. Graves never consulted us about the handling of any of the property of Mrs. Barnaby nor about a guardian.

Edward Bennett. Live in the Adirondacks and am a guide. Had a hotel for nine years. Knew Mrs. Barnaby for nine years and knew her husband. The first time she stayed about 3 weeks and the second time about 5 weeks with me. Some of the family had been there seven different times before 1890. Mrs. Barnaby arrived June 24, 1890, with Sallie Hanley. Dr. and Mrs. Graves came that summer as guests of Mrs. Barnaby. Mrs. Graves stayed two weeks and the doctor a couple of days at first. Dr. Graves talked while bathing at Long Lake, saying, "This is the first time I've had an opportunity to speak to you alone." He spoke of the trouble between Sallie and Mrs. Barnaby; said he had hired Sallie for her and it would be bad for her to be discharged. I said I had nothing to do with Mrs. Barnaby's business affairs, and she could fix the thing to suit herself. The doctor said he was her executor,

and she had to do what he said.

Sallie got a horse and rode it up and down before the hotel in a Mother Hubbard gown. She rode the horse man-fashion and made everybody notice her. Then she wound up by falling off the animal. She also had a fancy for riding in an express wagon and seemed to have had a good time generally. Mrs. Barnaby's former maids had not been given to diversion of that character, and she didn't like it.

Mrs. Barnaby talked with me about her affairs and of the will she had made. That she had left \$50,000 to Dr. Graves because he had looked after her affairs. She said, "I am dissatisfied with Dr. Graves and his management. I am going to make a new will and leave you \$10,000. You have taken care of me for nine years and I'll leave you \$10,000."

I had written, at Mrs. Barnaby's request, to Ballou that Mrs. Barnaby wished his protection. She never got any answer to the letter, and this affected her so that she cried over it for two days. She made the remark that she had paid Ballou \$10,000 for two days work, and it was too bad he would not answer.

Dec. 15.

Mrs. Barnaby occasionally took a drink, but have never seen her under the influence of liquor. She usually took about a couple of spoonfuls. Graves at one time had written a letter to her speaking of putting some money with his brother in a gold mine in Colorado. Graves and Sally Hanley were very good friends after the arrival of the doctor.

Cross-examined. Mrs. Barnaby paid \$3 per day during her stay for my services as guide, whether she went out or not, and \$30 per week for her board and Miss Hanley's. She paid the same board for the other maids, Misses Fraser and Cole. It was after Mrs. Barnaby received the

threatening letter from Dr. Graves that she spoke of reducing the bequest in the second will. Was not friendly with Dr. Graves after the doctor accused me of sending poisoned whiskey to Mrs. Barnaby in Denver; did not like Dr. Graves from the first meeting.

Mr. Stevens read to the jury several letters. One was an epistle in which Dr. Graves described the beauties of Cuba, and endeavored to induce Mrs. Barnaby to give up her trip to California for a visit outside the United States. Another letter was written by Mrs. Barnaby, urging Mrs. Worrell, Sr., to go to California with her, and urging her to write to New York whether she would go. Another from Dr. Graves came from Providence to Mrs. Barnaby, sending her directions as to taking the medicine prescribed for her memory. Again he speaks of going to Cuba. He talked about the brown autumn leaves in a poetical strain.

In the next Dr. Graves sent the deceased the names of some hotels at Havana. He described the climate of Cuba, and said one of the delights of staying there was that the ladies could sit out under the trees in winter on an evening with their low-neck dresses on. It was not fashionable, either, to wear a hat. In all these letters the accused expressed the greatest desire to contribute to the happiness of the deceased.

On April 21, 1890, Dr. Graves wrote a letter to deceased anticipating the joyous times they would have in the Adirondacks. He also stated that he had several investments in view that would make her so independently wealthy as to be envied by the many rich in the Eastern cities. They came to but a few—those in the "ring"—who could control the news of the ups and downs of trade, and he was one of those.

Mrs. E. S. Bennett. Am wife of the preceding witness; remember the visit of Mrs. Barnaby to the Adirondacks and that of Dr. and Mrs. Graves. When there, Mrs. Barnaby said she had left \$50,000 in her first will to Dr. Graves, and she said she was going to change it and give some of it to somebody else; never had any quarrel with Mrs. Barnaby, and we were always the best of friends; never heard of such a quarrel till she saw in the papers that Dr. Graves had said

so. She complained of Sallie Hanley and also of the doctor. When she received the letter threatening guardianship she cried for days. Mrs. Barnaby complained of Sallie Hanley because she did not dress her.

Cross-examined. Mrs. Barnaby was able to dress herself, but she considered it was the duty of her maid, and the latter neglected it. The complaints against Sallie Hanley were that she rode astride a horse "like a man." And, then, Miss Hanley

fell off a horse and did not tell Mrs. Barnaby. Mrs. Barnaby was very much displeased at her maid. Mrs. Barnaby said she would leave the Bennetts \$10,000, and I have read that the amount had been bequeathed them. Have talked to the lawyers about my testimony, and they have told me about the charge of Dr. Graves, when he tried to throw the responsibility of sending the bottle to the deceased; was indignant when I heard it; heard Miss Hanley say that Dr. Graves gave Mrs. Barnaby "lots of taffy."

Mrs. Mary Hickey. Born in Ireland; have lived in America 20 years; my home is in Providence, Rhode Island. Have been a widow 21 years; had to support myself and my family until I raised them. Knew Mrs. Barnaby since I have been in the United States; it is the first family I ever worked for; have been engaged in the family between Mrs. Barnaby's mother and Mrs. Barnaby herself since I have been in America. I promised her mother and father on their dying bed I would see to Mrs. Barnaby while she needed me. I did; I had the care of Mrs. Barnaby, all her clothes and some furniture belonging to her father. They left her some property; was two houses, large house on Broadway and a smaller house which her father on his dying bed gave her, understanding that a tenement in that house belonged to me during my life free of all expenses. Mrs. Barnaby, after her father's death, collected the rents. When Mrs. Barnaby was traveling in the South my daughter collected the rents, and mailed to Mrs.

Barnaby. Dr. Graves came to my house; that was after Mrs. Barnaby's mother's death; asked me if I would come and do a half hour's work for his wife; I said yes. Went to his house and agreed with Mrs. Graves I would go one day in the week to do this work, and I did. One day in Dr. Graves' office Mrs. Barnaby went down the street. Dr. Graves never knew Mrs. Barnaby then. The doctor said, "I think I can help Mrs. Barnaby." I says, "Can you?" Mrs. Graves says, "Yes." He says, "That is my study," and Mrs. Graves says, "Yes, he could help such things as paralysis; there was an old gentleman that hadn't walked for several months, a good length of time, and the doctor helped him and he was able to walk;" Next week Mrs. Graves and me was finishing up; the door bell rang, and Mrs. Graves opened the door, and there stood Mrs. Barnaby. Mrs. Barnaby said, "Is Mrs. Hickey here?" and Mrs. Graves called me, and I came out and said to Mrs. Barnaby, "gracious, what do you want?" I could do nothing but make her acquainted with Mrs. Graves. Mrs. Graves asked her in, and they both went in the office. The same evening she said to me, Dr. Graves was a very nice man, and he seemed to be a very nice man, and he said he could help her. Mrs. Barnaby was in the habit of calling at my house; she nearly lived there after her father's death. The day of Mr. Barnaby's funeral, Mrs. Barnaby came to my house; told me she heard the will read. I says, "What did Mrs. Barnaby leave you?" She says, "\$2500 a year." I says

that was as much as you expected?" She says "Yes," With that and my own rents I can live very comfortably." But the day after the funeral she says, "Mary, I am going to contest that will. Dr. Graves said I ought to have my rights. I think I can have my thirds."

I says, "Look here, before you interfere with that will, go to your own people and hear what they have got to say." She says, "I will, Mary, I will go out tomorrow, Sunday." The following Monday I was in Mrs. Barnaby's house, and I met Dr. Graves at the kitchen door. He says, "Mary, when you see Mrs. Barnaby be sure and tell her not to see those lawyers until she sees me." I says, "What do you know about Mrs. Barnaby or Mrs. Barnaby's people that you should interfere with her business? If you ain't careful you will get yourself into a scrape." He says, "Mary, I think I can take care of myself," and left me then. Seen Mrs. Barnaby that same evening. I says, "Have you seen Dr. Graves?" She says "Yes; I am going to contest that will." I says "Who are your lawyers?" "Mr. Ballou and Jackson. I have never seen either, I don't know them." I says, "Well, you can do as you please." She said Dr. Graves wanted her to sign a paper that Maud Barnaby was not her child. I says, "What are you thinking about, are you crazy?" She kind of laughed as it was a joke, and told me again. I says, "You know better than that. I tell you never to sign such a paper." She didn't say she would or she would not. "Well," she says, "Mary, if I cannot get my

rights, I will have my revenge." I don't know whether she signed it or not. Maud Barnaby was Mrs. Barnaby's youngest daughter. She was 18 years old then. Another time I was disputing with her about the will and she said she didn't like it one bit, seemed much put out about it. She says, "Well, if Mr. Barnaby could afford to give \$100,000 to his mistress she ought to have more than she got." She said Dr. Graves told her that. Shortly after he became her physician he moved into a very fine house.

One day Mrs. Barnaby telephoned for him and he did not come. Next day she said, "Doctor, I was very sick yesterday and last night, and Mary telephoned for you, and you didn't come." "Mrs. Barnaby," he says, "I was very tired. My wife says she called me once or twice, but couldn't make me hear or understand." I says, "Mrs. Barnaby's got an idea that nobody ain't tired but herself." He got some medicine for her and says, "Mary, any time that Mrs. Barnaby calls me, morning, noon or night, no matter whatsoever, you send for me and I will come, because, you know, Mary, Mrs. Barnaby is of some importance, and we have got to take care of her." That flattered Mrs. Barnaby, of course; no matter what she thought of it, in the middle of the day or at 1 o'clock the next morning, if she thought it, she would say, "send for him," but I didn't send for him because she didn't need him. Mrs. Barnaby was easily flattered; that was her one fault, especially by Dr. Graves. If he told her to stand on her head she would do it.

When she returned from the Adirondack Mountains in December, 1890, I had a talk with her. She says, "I came back to take my money and all my property." I says, "Have you got it?" She says, "I have not." She said, "Had a great talk and fuss with Dr. Graves over it, and it seems I can't get it, that he wasn't ready to give it up." She says, "You remember that either you or Kittie will have to travel with me this summer." I says, "I will travel with you," I says; "You will never travel with strangers any more. I will go with you, myself." She says, "All right; you be ready, and you be sure to learn to do my hair." That was all she needed, to put her clothes on, and do her hair. It was decided I would go with her, and I was getting my clothes ready to go with her when she died. I went down stairs and kissed her, and I seen no more of her until I seen her funeral. I had a letter from her from California, after she went with Mrs. Worrell, asking me or kind of requesting me to watch Dr. Graves. There was only a few words. She says "You watch Dr. Graves, I have reason to mistrust him," she says, "and you know I am your friend." That was all. My daughter burned it.

Shortly after Mrs. Barnaby had the talk at my house in December, I saw Dr. Graves when he came around to collect the rents. I asked the doctor, "What did you send Miss Hanley with Mrs. Barnaby for, was it to spy on her?" "Certainly, Mary."

I said, "Doctor, how long did Mrs. Barnaby stay at your house, and when did she go?"

He said, "Mary, I don't know whether she stopped one night or two, and I don't care a damn. I can sympathize with you now, Mary, I know what you had to put up with. I got something of the same." He said that he would never send a friend of his with Mrs. Barnaby again. Next saw Dr. Graves in April, when he collected the rents. He says, "Look here, Mary, as soon as Mrs. Barnaby takes that property out of my hands she will be brought in insane; there will be a guardian put over her; I will be her guardian, and she won't go that much without my consent." I says, "Doctor, if you bring Mrs. Barnaby in insane, or if Mrs. Barnaby goes to the asylum, I will go with her," so I would if she went to the crazy house, I will go with her. "Mary don't be at all surprised," he says, "to hear any time that she will have a shock." I says, "how come you to know that, she looks healthy and strong." He says, "She walked up hill to my house," it is a very steep hill, and he says, "when she got to my house there was purple marks around her eyes."

He says, "Mary, wait and see." I never seen Dr. Graves afterwards until I seen him in this court. His manner while he was talking was very nervous. I said, "What is the matter with you?" He says, "Mary, I am tired." He didn't look a bit like Dr. Graves, because I knew him so well when he was cheerful and jolly, but he wasn't either then.

Cross-examined. Mr. and Mrs. Barnaby lived happily together. I don't believe she ever made a complaint of Mr. Barnaby to me.

I thought that \$2500 and \$4000 left her, and the rents she might have, she might have a pretty fair time. I thought the most she would spend the more expense for men to take care of it, that is what I thought. Of course I don't know whether I was right or not. I told her to be contented with this \$2500.

When she returned from New York told me the doctor had got a girl to go with her and she hated the girl. Told her if she wasn't satisfied she could send her home; I think I said the same to the doctor myself. I asked him once in his office about it and he said they got along very well together. I says no, Mrs. Barnaby didn't like Miss Hanley. Well, he said, maybe they get along very well together; she was a pretty shrewd girl anyway.

I got to this place three weeks today; am stopping at the Albany; do not know who pays my expenses; my tickets to come here were furnished for me and for the company; we came together; I didn't come alone.

Mr. Stevens. There is no controversy about that; Mr. Conrad furnished the money for all these witnesses. I will have that in the record if you want it; as a matter of fact he furnished every dollar of it.

Henry G. Trickey. Am connected with the reportorial staff of the Boston Globe; met Dr. Graves in Providence the day Mrs. Barnaby's remains arrived from the West. Charles E. Lincoln of the Boston Herald was with me. He opened the interview with a voluntary statement that he was surprised to learn upon his arrival in Providence

that in the minds of certain persons he was suspected of being the cause of Mrs. Barnaby's death. I asked him if he thought Mrs. Barnaby had been poisoned. He said that he had no doubt of her being poisoned by the contents of the bottle sent her from Boston, and he said that he got a telegram saying that Mrs. Barnaby was dead, and he supposed she died of a shock of paralysis. He said he bought a ticket from Providence to New York because he couldn't get one from there to Denver. He then took the fast limited train on the New York Central Railroad to Chicago. Then I asked him how he lost so much time in Chicago and what he did there. He was unwilling to answer the question until I told him that in view of his being suspected of the crime it would be much better for him to make a full statement of all his actions and his reasons for them. At this he said: "I went from Chicago to Sterling, Illinois, to see an uncle whom I had not seen for many years." Then I asked where he went from there, he said: "I went to Cedar Rapids and stayed there long enough to lose the fast train West." He said he didn't see the persons personally interested, the trustees of the Barnaby estate, because he was so confused that he hardly knew what he was doing. He said he was so unnerved by hearing upon his arrival in Denver that Mrs. Barnaby had been poisoned that he had not inquired much about it. I asked him if he knew Mrs. Barnaby's address in Denver and he said that he knew her mail was to be sent to the Schermerhorn &

Worrell Investment Company. I told him that whoever sent that bottle must have known Mrs. Barnaby's address, and asked him if he knew of any one else who knew it, and he said that he knew of several persons who knew it. He said he had told Mrs. Conrad or Mr. Winship that certain information concerning the Barnaby family which he had promised to keep secret he would now have to make public in order to protect himself.

He did not intimate what was the damaging facts that Mrs. Conrad had requested him to keep secret.

He said he knew Mrs. Barnaby had made a will about the time the contest suit was settled, but he didn't know its contents. However, he learned that Mrs. Barnaby had said he was remembered. But he didn't know whether it was \$10 or \$100,000. He said he had no motive for the crime, as he was in receipt of a liberal salary from her. He said the salary was in excess of the income he could derive from the sum she had left him in the will. He stated that Mrs. Barnaby had had to pay blackmail money and thought probably that she had refused some one hush-money and the disappointed person had killed her; said she heard of him through friends; that he was a specialist. He said he heard impeachments about Mrs. Barnaby's character and that experiences of his in the Adirondacks convinced him that she was not of good moral character. She had been a vile woman and had had vile lovers; knew of the strained relations between husband and wife. He

was sorry he ever met her and that she was not a woman he would admit into his family circle. He declared that Ballou & Jackson had contested the will, and that he had consented to act as Mrs. Barnaby's financial agent, only at the earnest solicitation of the deceased. When in the Adirondacks he saw Mrs. Barnaby and Mr. Bennett drunk together in an ice-house on the place of the Bennetts. Dr. Graves said the result of this escapade was a big row between Mrs. Bennett and Mrs. Barnaby. Afterwards Mrs. Barnaby and Mr. Bennett were criminally intimate. He said he and his wife left the Adirondacks on that account, and he thought this might be the motive why Mrs. Barnaby changed her will.

He said the man who sent the bottle must have known of her summering in the Adirondacks. I asked him if he thought jealousy might be a sufficient cause of murder when the woman involved was old and paralytic. He asked what other motive there could be? Said that there were no financial reasons to attribute a motive to anyone, and least of all to him.

He said that when he heard of the death of Mrs. Barnaby he hastened to start for Denver, leaving on Sunday night to protect the interests of Mrs. Barnaby. She had valuable and costly jewels and valuable papers on her person and he wanted to take charge of them. I asked if it was to protect the interest of deceased that he stopped off on the way. He said after deliberation he had concluded that his haste was un-

warranted, and he thought he would stop on the way. I asked him if he could prove his whereabouts on the way West. "If my wife has kept the letters I wrote her," he replied, "I can easily prove where I was all the time." His manner during the interview was varied. At times he was composed, and at others he was violent.

Charles A. Rogers. Am a son of undertaker I. N. Rogers. Remember the circumstance of the body being brought to Rogers'. It was not embalmed before the autopsy; I put the sealed jar in the safe and it was in my care until turned over to Dr. Headden.

December 21.

Charles E. Lincoln. Am Providence correspondent of the Boston Herald; have known Dr. Graves four years. Interviewed him April 27 last; began with a statement by Dr. Graves that he thought he was in a position to use a horsewhip on some one of us, and that he would do so if he could find the proper one. He was asked why. He replied some one had sent a decoy message to his wife, asking her to meet him at Danielsonville. Dr. Graves wrote a message to his wife then, telling her to come back to Providence.

Had a conversation with the doctor about the deceased. He said he was appointed her business agent on her own solicitation, which was repeated three times; that Mrs. Barnaby had many lovers, and that he had been requested by her daughters to keep many things secret. He told me of the Bennett muss, and said Bennett was a loafer and

a drunkard; said he was a beneficiary of the will; told me an autopsy had been held, and that Mrs. Barnaby had been killed by poison and the Denver authorities were making a complete investigation. He had not heard of the poisoning of Mrs. Barnaby till he was told by Mrs. Worrell; said Mrs. Worrell was a coarse woman, and had not been so sick as she pretended.

Was companion of reporter Trickey when he interviewed Dr. Graves at his residence, April 28. He said he became acquainted with the deceased by treating her for paralysis. She was in a low condition, and he gave her much extra attention. Both of us asked questions. He told us he and his wife had been guests of Mrs. Barnaby in the Adirondacks the previous summer. After they arrived he said Mr. Bennett and Mrs. Barnaby drank a good deal, and, looking through a crack in an old ice house he saw the two lying drunk on the floor with all the indications of a previous revolting transaction. Mr. Trickey then said Mrs. Barnaby must have been a w——. He said she was a d—— w—— in her instincts. He and his wife left disgusted. They had never known before of anything wrong with Mrs. Barnaby.

The doctor said he had three theories of the crime. He inclined to the opinion that blackmail was at the bottom of it all. He was of the firm belief that a crime had been committed. Mrs. Barnaby, he declared, had a mania for making wills and building a tombstone for her parents, and leaving a bequest

for Grace Episcopal Church in Providence.

Martin C. Day. Am city editor of the Providence Journal. I attempted an interview with Dr. Graves on a Broadway horse car on the morning of April 28, in regard to his attack on the character of Mrs. Barnaby, published in the Herald that morning. Dr. Graves refused to deny or affirm the statement in the Herald. He was nervous and excited when an attempt was made to show him the Herald article, and at first remarked that he "might have said it." He said, "I shall neither affirm nor deny it. My lawyers have told me not to talk."

Cross-examined. Dr. Graves spoke in a complimentary manner of Mrs. Barnaby the previous evening, and that was the reason I desired to obtain a statement from the doctor in reply to the attack published in the Herald.

Mrs. Margie Smith. Was housekeeper in the Barnaby family for 18 years. Mrs. Barnaby was accustomed to take refreshments in the form of egg nog and light stimulant very sparingly.

Mrs. Mabel Conrad. Am the daughter of Mrs. Barnaby. When mother died was living in Billings, Montana; was informed of her illness and death by a telegram from Mr. Worrell, Jr. When I learned mother was dead, I started for Providence. I had gotten to St. Paul and received a telegram to return to Denver; arrived Thursday morning. First saw Dr. Graves at the Union Depot in Denver, when we were starting with the body to Providence. Mr. Clark,

my cousin, introduced him. He said he didn't understand the name, and appeared very much excited. Then he said I looked like my mother.

The second conversation was on the train. He merely said that he would talk to me the next day. Between Chicago and New York I didn't see him at all. At Jersey City I met Mr. Winship of Providence, an old friend of my father. Dr. Graves just passed the compliments of the day to Mr. Winship, and hurried to catch the Providence train. He went before us. Never saw Dr. Graves before I saw him in Denver. Mother was in the habit of taking small drinks of whiskey. She never took them to excess.

Once I saw Dr. Graves at the Barnaby residence; he said he was glad to see me. He was very sorry about several things that had appeared in the papers, and he said he wanted to say they were not true. He spoke to me about the decoy telegram sent to his wife. I introduced Mr. Hanscom to Dr. Graves as Charles Conrad, my brother-in-law. He seemed nervous and excited. He came four other nights. I was not present at those interviews, but I saw him coming and going out of the house. I learned though what had been said.

Maud Barnaby. Am 21 years old; never made any request that Dr. Graves be appointed agent for my mother. Since mother's death have lived with my sister. As to mother's habit of taking liquor, she drank in small quantities whenever she thought she needed it.

O. M. Hanscom. Am an em-

ploye of the Pinkerton agency; first saw Dr. Graves at the Barnaby house on 1st or 2nd day of May, in the parlor and library. I was introduced as Charles Conrad. Mr. and Mrs. Conrad were present. Dr. Graves talked first to Mrs. Conrad. He said the newspapers had exaggerated statements he had made, and he wanted to explain them. "Your mother was a dear friend of mine and a noble woman," he said. "I did make some remarks to reporters under great pressure and I am sorry. I want to take them back." He said he was laboring under a mental burden. His conversation was cool, but he acted nervous. Mr. Conrad and myself questioned him as to the condition of the Barnaby estate. In reply to me he said he had charge of Mrs. Barnaby's property. As to the cause of her death he said when he got the first dispatch he believed she had died from a stroke of paralysis.

Saw him next at the same place on Sunday night. Mrs. Conrad was not present. After giving an account of Mrs. Barnaby's estate, he said he had a record of the securities and he could give them to Mr. Conrad. I questioned him as to any enemy who might have sent the poison. He said he did not know of any enemy who would have done that; said he thought some one sent the bottle to make Mrs. Barnaby sick, and that the object was blackmail. No one used to poison, he said, would have sent this stuff, but something that would have left no trace.

We said perhaps a bottle of pure whiskey had been sent and tampered with in transit. He

said that might be. He complained about intimations in the press accusing him of the crime.

Next I saw defendant Monday evening, at the same house, in the library. Mr. Conrad was there. It was the night of the day Mr. Conrad and Dr. Graves had been to Boston to examine the securities. We talked about publishing a statement as to Dr. Graves' management of the property. We argued with him that the poisoning might have been an accident. He said that such might be the case.

Part of the time the third evening I was out of the room. After I returned Dr. Graves said: "Your brother and I have come to an understanding. You keep your word with me and I'll keep mine with you." Saw him again Wednesday night. Was in and out of the room this evening. The Doctor spoke about publishing a statement. Mr. Conrad said he would publish a statement and sign it if he found everything all right.

On the fourth night was called into the room, and the Doctor pulled a chair up near me and said: "Will you give me your word not to testify to what I am going to tell you in a court of justice?" I promised. He said: "I did send Mrs. Barnaby a bottle of whiskey, and when it left my hand it was pure whiskey." Mr. Conrad then arose and left the room. After this the Doctor said: "What I have just said to you is a damned lie." I told him that if that were so, Mr. Conrad would take his wife and go back to Montana. When Mr. Conrad returned, I told him what the Doctor had said. The Doctor said: "Mr. Conrad and

I understand each other. You keep your word with me, Conrad, and I'll keep mine with you." I asked him where he got the whiskey. He said his head bothered him and he was in no condition to talk. He promised to tell more some other time.

He said he felt ill and I asked Mr. Conrad to get him some whiskey. I got him a little. I advised him to go home and talk to his wife and make an explanation. "I can't do it. I have told my wife and friends I never sent the whiskey and I can't do it."

He said he had been so shocked at Mrs. Barnaby's death that he had to deny to his wife and friends that he had ever sent a bottle to the deceased.

On Thursday night we saw him at the same place. We talked about the bottle. I asked him if he had spoken of it to his friends. He said he had not. I told him the grand jury in Denver was in session considering the matter, and he had better go West and appear and explain, or publish some sort of statement. The newspapers were advancing the theory that a bottle of whiskey had been sent. Before the Doctor left he said he would let us know if he concluded to go to the District Attorney in Denver. He never sent me any word. I never saw him again until I saw him taking the train for Chicago.

Cross-examined. Was employed on this case by Col. Winship.

The Doctor said when he got home and found his wife decoyed away, he rushed down to the telegraph office, and was at that time laboring under great ex-

citement, not knowing where his wife was; that he had been seized by the reporters at the telegraph office and that he had made a few unwise statements.

Mr. Conrad said: "This is a matter of great importance to me. I have political aspirations, and unless this is cleared up it will hurt me?"

Did not hear Mr. Conrad say that he had contributed \$25,000 to the Montana campaign fund, and that by contributing as much more he hoped to be elected United States Senator. He suggested that pure whiskey might have been sent, and that the Worrells changed it, saying that old Worrell was bankrupt.

Heard Mr. Conrad say to Dr. Graves, "If you know anything about what caused Mrs. Barnaby's death; if you sent her a bottle of pure whiskey, tell me, and it will be all right," and he denied any knowledge of it. On Thursday night he called me to his side and said: "Now, what I tell, you will promise on the honor of a Conrad never to reveal?" and I promised. Then he said: "It is true that I sent Mrs. Barnaby a bottle of whiskey, but it was then pure." I asked him where he got his whiskey, and he said, "I am not well tonight, and I can't talk any more tonight." Then Conrad left the room, and Dr. Graves said to me, "What I just told you now is a d— lie. I didn't send it, but I want Conrad to take his wife and go home." Shortly after Mr. Conrad came in and I told him what Dr. Graves had said. Dr. Graves then said, "Mr. Conrad and I understand each other, and if you keep your word I'll keep

mine." Did not use any intimidation toward Dr. Graves.

Heard Mr. Conrad and Dr. Graves having loud words. Heard Conrad say in reply to something Graves had said that he "would follow him as long as he lived and would leave it to his children after him." Also heard Conrad say to Graves that he had a witness "who saw the doctor put the package in the mail." I left the room so that they could have a confidential talk because I thought it would be better. The parting of Conrad and the Doctor appeared friendly enough. Dr. Graves said he would consult his friends and decide about a statement.

Did not hear Graves say "I'll be damned if I sign that paper," or "You boast of being a Conrad of Virginia, but I would rather be in a prisoner's dock than sign that paper." Graves said that sooner than make a statement or tell his family he would blow his brains out.

John H. Conrad. Am 36; live at Helena, Mont.; my business is merchandising, cattle raising, banking and mining. Mrs. Barnaby was the mother of my wife. On news of Mrs. Barnaby's death I went to Providence; when I arrived Mrs. Conrad had received a letter from Dr. Graves apologizing for the horrible things he had said about her. I took the letter and went to Dr. Graves house Saturday evening; was met at the door by Dr. Graves. He said he was glad I came over and I said: Dr. Graves, my wife is very much prostrated over the grief and trouble she has had over this thing, and I think it would do her good if you would go over

it with me and talk it over at the house. He said he would, and we went to the Barnaby house in a carriage I had driven over in; were admitted by Mrs. Conrad, and shown into the parlor, where she introduced Dr. Graves to Mr. Hanscom as my brother. We adjourned to the library. The first half hour of this conversation was occupied entirely by Dr. Graves apologizing to my wife for the many things that had appeared in the press, and saying, "Your mother was a good and noble woman and she was my best friend. I don't know why I should have said it. I feel as though I could bite my tongue out for having uttered those words against your mother; but my wife was decoyed away from home by a decoy telegram sent by some newspaper reporter, and I was excited, and I don't know why I should have uttered and said what I did about your mother; she was a good, noble woman and my best friend." Time and again he repeated "forgive me, forgive me, for having used those words."

I asked him if he had any theory as to who murdered Mrs. Barnaby. He said he didn't know unless it was the Bennetts, and he mentioned a red headed Irishman who had blackmailed Mrs. Barnaby out of money, and knew that some one was continually blackmailing her out of money, for at one time he had to go and get five hundred dollars in currency, that he was satisfied she wanted to give to a black-mailer. He said he did not know the name or would not state it; I urged him then to tell of any one else he thought could have a

motive to poison Mrs. Barnaby, and he stated that the Worrells knew a great deal more about it than they cared to tell; he stated Mrs. Barnaby had made a will, and he was satisfied, while he didn't know the contents and had never seen it, his lawyer and friend Ballou had drawn up this will and had given it to him sealed, but he was satisfied the greater portion of the fortune was left to my two children, Florence and Barnaby, and he didn't know whether he was a beneficiary under the will or not, but he had been told that Mrs. Barnaby had told his wife that she had remembered him in her will. He said, "I hear there has been another will made." I says, "Yes, there is another will; she made a will at Chester, Pa.," and he asked me if I knew the contents of it. I said I knew that he was left \$25,000 under this will, and was appointed sole executor. He said, "Well, that won't do, Mrs. Barnaby had a mania for making wills, and some one was continually trying to get her to make a new will, and I am satisfied these people influenced her, and your children will be left out in it, and the first will is the will that ought to stand."

He said he believed the person who sent this whiskey to Mrs. Barnaby was trying to blackmail her; was satisfied that this old woman who didn't have an enemy on earth and could not make a fuss with anybody, that the person that sent it didn't send it for the purpose of poisoning or killing her; they simply wanted to make her sick in order that the next time she did not accede to their demands

they would say: "Well, old lady, it won't go so well with you next time; you better have done as I wanted you to."

He stated that he had started Saturday night for Denver on a receipt of a telegram, that he knew Mrs. Barnaby had many valuable jewelry and papers and expensive diamonds, of which she had many thousand dollars worth, and Mrs. Graves urged him to go at once; and it would be too bad to have the old woman shipped East by express or in the hands of a railroad, and nobody to accompany her. He started, and when he got to Chicago he thought he would run down to Sterling, Ill., to see an old uncle that he had not seen for thirty years. He got back to Chicago and took another train for Cedar Rapids, Ia., to see another relative whom he had not seen for a long time.

He said he had her funds all in good shape, and if I would go home with him I could copy a list that he had; he said that he had invested the most of her money before he went to Denver, a greater portion of it, all except \$16,000, in securities. The Doctor and I left the house together. He spoke to the driver and said: "Don't drive to the house, but drive two blocks above my house and let us out there," which he did.

Next Sunday evening, 3rd of May, I drove to Dr. Graves' house and took him to the Barnaby house. We went to the library, found Hanscom there, and began the discussion of this crime. Many things were gone over the same as the night before. Dr. Graves said he didn't know who could have done it

unless it was the Bennetts or some one who was trying to blackmail her; he had no faith or confidence in the Worrell's, and believed they knew more about it than they were willing to tell.

Hanscom and myself both advanced the theory that there might have been a bottle of whiskey sent, and it was possible someone drank the whiskey, and took and put the first thing they had at hand in it. Dr. Graves took very kindly to this theory, and said it hadn't occurred to him before, but that it was quite probable that was the way it happened; he didn't believe there was anybody who had anything against Mrs. Barnaby or wanted to kill her.

I told him that the newspapers were advancing the theory that there had been a bottle of pure whiskey sent, and they were of the opinion this death was caused by accident.

I led him on to these securities, and Dr. Graves said that if I did not think those securities were all right to go down to Boston with him and look them over; that he would show them to me. And we arranged to go the next morning at 9 o'clock. I met him in Boston the next morning; we went to his box in the Trust Company and got it out. A great many securities were not in the box, but he told me to wait until we went to Payne, Weber & Company, the brokers, and get the rest of them, and I made a complete list of everything I found. I found those securities consisted of bonds, stocks, bridge stocks, electric bonds and stocks and

mining stocks. They were turned over to Col. Van Slyck as custodian appointed by the court.

Next saw him that night at the Barnaby house; he said the night before, "You need not come over for me tomorrow night; just send the carriage at the same place and time; I will come out and get into it and go over." He arrived at the house at a quarter to eight. We at once went to the library. Dr. Graves brought with him that night—Monday, May 4th, after we returned from Boston—a statement that he wanted me to sign applauding him for the good management of Mrs. Barnaby's affairs, and which I agreed previously to do. We then began to discuss this crime, and I said, "Doctor, the papers are still advancing the theory that there has been a bottle of pure whiskey sent and that this death was caused by accident." About this point Mr. Hanscom went out of the room. Dr. Graves sat beside me and said, "Now, Mr. Conrad, take your wife who is crazy to see her babies, and go home tonight on this 12:30 train, and say that Dr. Graves sent this bottle of whiskey, and when he sent it it was pure whiskey. I will never deny it so long as I live. I will, so help me God, keep my mouth sealed. You take your wife, who is crazy to see her babies, and you want to get back to the strike you have in your business, you go on the 12:30 train tonight. These newspapers are run out of powder and steam; the Denver grand jury will soon be a thing of the past, and the State of Colorado is too poor to make all these expenses and trouble

unless you furnish the money." I said I wanted to call my brother in and hear this statement. He said, "I will not tell your brother, I would rather take a six shooter and blow my brains out before telling any living soul; I will die first." Finally Mr. Hanscom came into the room. He says, "Now, your brother and I, Mr. Conrad, have come to an understanding. This thing is all settled, and is all fixed up; we understand each other." I ordered a carriage and he left at a quarter to 11.

Tuesday night about 8, he got to the house. Hanscom left the room, and I said to Dr. Graves, Mr. Pinkerton has been here today, and he is satisfied you can give the correct solution of this whole mystery, and that you ought to do it. Dr. Graves then got up, moved the sofa out into the middle of the room and looked under it; then he opened the shutters, blinds, of the three windows, and raised the curtains and tapped on the windows, each of the three windows to see none were opened and said, "I am afraid of these Pinkerton detectives, and I want to satisfy myself that none of them are here. Now, I did send a bottle of pure whiskey to Mrs. Barnaby, and want to tell the truth. I might as well go to hell over one road as another, I did send that bottle." I said let me call my brother in here and I will explain it all to him. He said, "No, I will not tell him, I had rather take a six shooter and blow my brains out. I have denied it to my wife, mother and father-in-law and Mr. Ballou and my lawyers, and I will not tell your brother." He says, "Look

here, Conrad, if I'm given any trouble about this thing I will dig up scandal 10 feet deep about this family." I told him I was determined to find the murderer of my wife's mother and I would spend my whole life to find that murderer, and before I died I would train my boy to do the same thing until he brought the murderer to justice, whoever he was. Then he said, "Bring him in and I will tell him the truth. I did send that whiskey and I might as well go to hell one way as another." I called Mr. Hanscom in and Dr. Graves said, "Will you promise me on the honor of a Conrad you will never tell this against me in a court of justice?" and Mr. Hanscom said he would. He says, "I sent that bottle, but it had good whiskey in it when I sent it." Mr. Hanscom pressed him for details, how he got the whiskey and where he sent it and how, and he said, "No, no, my head is in a whirl. I won't tell you tonight, but some time I will make a statement and give it to Mr. Conrad of all about it, just how it was done." Mr. Graves then asked for some whiskey; I went out in the dining room after the whiskey; the decanter set there. When I came back in the room Mr. Hanscom says, "Dr. Graves says that it is all a damned lie he has been telling here." I says, "What?" He says, "Oh no, that is the truth just as I told it; we understand each other."

At about 10:30 Dr. Graves asked for a carriage to go and it was ordered and he went home. Before he left I told him he ought to come out and print a statement in the Providence pa-

pers and send it to the District Attorney at Denver, saying just as he had told me, that he had sent a bottle of pure whiskey and the death was the result of accident. He said, "I would rather die first," his wife and friends would all leave him and he could never live in Providence again; he had denied it to them all the time.

Next saw Dr. Graves Thursday evening, at the same place, Barnaby house in the library. We again urged him to make a full confession. He said to give him time and let him go home and talk it over with his wife and mother and father-in-law and lawyers and he would make up his mind what to do and he would let me know the next morning, either do one or the other, either come to Denver or he would come out and publish a statement. He said, "I expect to spend my life in jail; I will go home and get ready because I expect to spend my life in jail; I may be arrested at any time; I will not spend one dollar to hire lawyers to defend me; whatever I have my wife and family may have to live on; I will let you know in the morning." I waited until 11 o'clock, and drove to Dr. Graves' house. I said, Doctor, I have waited and haven't heard from you. He said, "I am going to Denver. I have got the tickets in my pocket." I said, "I am very glad to hear it; I will go with you." He says, "I prefer to go alone." I went back then and got ready to go to Denver myself and left next morning by way of Worcester and arrived in Chicago Sunday morning. I didn't see Dr. Graves until I

went to get on board the Burlington train, and when I got aboard of the train I learned that he was on the train and we came on the same train to Denver and I never have seen him to speak to him since.

December 22.

Cross-examined. It is true that I am supporting this prosecution—my wife and I; have employed detectives. I also made statements reflecting on Col. Ballou, and he sued me for criminal libel. It implicated Mr. Ballou as a confederate of Dr. Graves in robbing Mrs. Barnaby of her property.

Dr. Graves thought Mr. Hanscom was my brother. This was a preconceived plan to get a confession out of him. When I and Dr. Graves met for the interview in the Barnaby mansion there was not the slightest quarrel or misunderstanding. I always had to treat Dr. Graves with the greatest cordiality in order to get him to return the next night. I never ruffled him in the least. When he threatened to heap scandal up about the Barnaby family, I wept at the accusations brought by him and Col. Ballou, against an innocent family. Col. Ballou stated in court when the will contest was up that he would cause a scandal in the Barnaby family unless the suit was settled. It was published in the Providence papers, and Col. Winship told me he made the threats of scandal. They were absolutely and maliciously false. Mrs. Barnaby was the best woman that ever lived. Hers was a happy family till she got under the influence of these two men—Dr. Graves and Col. Ballou.

There was never an unkind word spoken in the household. There was never an unkind feeling between Mrs. Barnaby and her daughters. My wife wrote to me that Col. Ballou had threatened the family with scandal. She and her sister Maud were willing to give up half their cash dowry to settle the will. She wrote to ask me what to do. They did not fear that any scandal could be caused, but they did not want to go to court with their mother. I telegraphed her to do whatever she pleased about the matter.

Mr. Barnaby was reputed to be a man of some means. I think the appraisement showed him to be worth about \$1,700,000.

Graves insisted on my publishing a statement that he had handled the estate of deceased honestly. Instead of publishing the statement, I wrote out and published an inventory of the stock as I found it.

Mrs. Barnaby was an aged paralytic. She couldn't talk six minutes without forgetting what she was talking about. She could never tell anything of length without doing so in disconnected parts. Her mind al-

ways wandered in her conversation. She was a paralytic for 28 years. To the time Dr. Graves began to doctor her she was in good health. After he began to give her medicine she became nervous and sleepless. She never took medicine before he began to prescribe for her. Mr. Barnaby always sent her to the springs in Michigan, California and other places. That was all the treatment she took.

I told Graves I was on the ticket for first Governor of Montana; that this had cost me a good deal of money, and that I had no other political aspirations; that it would cost too much to be a United States Senator to make the place worth having.

Did not offer Graves \$35,000, or any money, if he would admit he sent the bottle to Mrs. Barnaby. Yes I bore all the expenses of the witnesses for the State.

Thomas Flanagan. Live in Providence; am a hack driver; I carried Dr. Graves to the Barnaby house on five different occasions. I got about one and one-half blocks from his house.

Mr. Stevens read a lot of letters from Dr. Graves. The first in December, 1889, congratulating Mrs. Barnaby upon the successful settlement of her suit against the estate. The next was with some medicine for her memory, etc. After dealing with the purchase of a trunk and other minor matters, it referred to the time the final payments would be received. Jan. 7 he wrote about the lack of a direct post office address and impressed upon Mrs. Barnaby the necessity of keeping him informed. The next acknowledged that Dr. Graves had received \$4400 from Ballou & Jackson for the payment from the executors. He told her that this might have to last for a year and a half and that expenses should, therefore, be limited to such as recommended themselves to both. Mrs. Barnaby was instructed how she would cash his checks. In case of being in a hurry she would have to telegraph to establish identity. The next sent passports and a lot of good advice for a trip to Cuba. The next was

in February, when the Doctor sent three \$100 checks and instructions about the necessity for their address in Cuba.

April 27 he sent \$300 and said, "As soon as we have your big pile I can invest it so that it will make you rich." The letter was in the vein of economical teaching and said that Mrs. Barnaby would sometime "surprise the dressmakers," but must go slow for the present.

Oct. 12, 1890, Dr. Graves wrote that the executors had written to him that they heard Edward Bennett was repeatedly drunk and was not a proper person to accompany a lady. Graves said he had told them that Bennett was a good guide, but had the reputation of a drunkard. The letter gave long instructions how she should get her trunks home and said he hoped to meet her and have a long talk over "their delightful trip through the lakes and woods."

October 14 the Doctor said that Mrs. Barnaby must have misunderstood his letter. He had put the thing as delicately as possible, he said. Some persons had come from the Adirondacks and told stories about what had happened there. He continued: "Now, in regard to a guardian, it is I who have always opposed such a step." He said it had come up before and he had crushed it and could do the same thing again if she had confidence in him. He warned her against being influenced by any one but himself and said that he could not help people coming from the Adirondacks and telling stories. He had defended her, he said.

September 17, 1890, he wrote about being of a mind to write up the story of the trip in the Adirondacks and publish it under the name of "Tally Ho," in book form. He said he had made an appointment with the executors for a meeting and that they had trouble raising money. "Of course," he added, "the property is all theirs, but things do not always go right in this world."

June 3, 1889, the Doctor notified Mrs. Barnaby that he had forwarded Sallie Hanley and was sure the maid would prove of great benefit to her. He said the trustees were much pleased to learn she was to have a traveling companion. Mr. Ballou had also said it was a good thing and Graves said "looked so nice," when he said it.

A letter of July 8, 1891, enclosed \$50 and was addressed to Miss Hanley to save Mrs. Barnaby trouble. She was instructed to get receipts for any money she paid.

James L. Lindsey. Have been here for 11 years; teller for the First National Bank of Denver and for the First National Bank of Aspen. My duties require me to be an expert in handwritings; am constantly called upon to make examination of signatures. Have compared the writing upon this bottle and these letters of

Dr. Graves. In my opinion the inscription upon the bottle was written by the same person who wrote these letters.

Mr. Pence. Can you tell by looking at the body of the letter whether it was the same hand that wrote the signature?

Objected to and sustained.

You compared both the signa-

ture and the body of these letters with the label on the bottle? Yes, sir.

How many comparisons did you make? Several.

Did you use a microscope? Not to any extent. My opinion is the same hand that wrote the letter which Dr. Graves acknowledges having written to Mrs. Barnaby, wrote the inscription on the bottle.

I picked out some word or letters and compared them with the same letters on the bottle.

(*Mr. Pence* stated that the defense and State had agreed on a plan to save time. Witness was to designate the letters in the inscription, the convicting circumstances and the medium of comparison. Then bottle and letters were to go to the jury for their determination. This the witness proceeded to do at great length.)

A man does not write the same way at any two times to a hair. It is not common to find a handwriting like Dr. Graves'; so uncommon I never saw another like it.

I think there is evidence of the attempt to conceal in the inscription, because it is unlike the writing in the letters.

Leo Capallier. Was born in

Calais, France. Have lived in this country for 18 years; have made a special study of handwriting for about nine years. Had had six years' experience in this line of work before coming to Denver; have examined the writing on this bottle and also that of the letters of Dr. Graves. Am satisfied that the inscription on the label of the bottle was in the handwriting of the letters, and the same was true of the threatening letter purporting to have been written by Dr. Graves to Mr. Conrad.

Cross-examined. I teach French for a living.

Mr. Macon produced a piece of paper on which some words were written, and asked if he could tell whether the writing was that of one or two persons.

Prof. Capallier. I could not.

Mr. Pence objected that it was not a fair test as to the expertness of the witness in reading handwriting.

JUDGE RISING said that it was not a test, but simply one step in the test.

Mr. Macon. Isn't it a fact that such clever forgeries have been committed that the best experts have been fooled? I think

THE TESTIMONY FOR THE DEFENSE.

Dec. 23.

Edward Field. Am clerk of the Municipal Court of Providence. Two wills made by Mrs. Barnaby were presented at my court. The Chester will, so-called, was the first filed by Mr. Van Slyck; the second will by Dr. Graves. This will was sealed

in an envelope; saw no evidence of its having been tampered with.

Daniel R. Ballou. I have lived in Providence 25 years; was admitted to the bar about 26 years ago; knew Dr. Graves 35 years ago when a student in Ross Institute at Thompson, Conn., and

some four years ago, he appeared at my office one day and renewed the acquaintance. About a year ago this fall Dr. Graves consulted me about two little matters, but up to that time had never been his attorney at all. In October, 1889, I was summoned by telephone to go to the office of Dr. Graves; that there was a lady there that wished to advise with me. I went there and went in and met for the first time in my life Mrs. Barnaby, though she lived a near neighbor to me. She wanted an attorney to contest her husband's will. I contested the will. I didn't offer any evidence myself, but cross-examined the witnesses that were produced, and the will was probated. I then took an appeal up to the Supreme Court, which I did, rejecting the provision in the will in order that Mrs. Barnaby might avail herself of her dower rights. Mr. Tillinghast came to my office as the representative of the estate to suggest a compromise.

Mr. Macon. Mr. Conrad swore that you threatened to make an attack upon Mrs. Barnaby's character. Did you ever at one place or another, make any such threat? I never did. After a discussion we arrived at a sum of one hundred and five thousand dollars. This settlement went into the court and was made a part of the decree of the court. Mrs. Barnaby asked me before the compromise was formulated what my charge would be for my services. I told her I thought I ought to have \$10,000. She remarked she thought that the fee was a little large. I told her that I didn't feel that way about it, and she acquiesced in the rea-

sonableness of the bill, and asked me if I would see that a sum of money was secured at an early date under the compromise, and I suggested then that \$15,000 should be paid as early as possible after this agreement was carried out, out of which she agreed I should be paid my fees, and the balance should be held for her use. Have been paid \$14,400 on the compromise. I notified Dr. Graves that I had in my possession for Mrs. Barnaby \$4,400. In the course of a week Dr. Graves brought the receipts properly signed, and I passed him a receipt on account of the services rendered for \$10,000, and gave him a check for \$4400 and took the order and receipt from Mrs. Barnaby and also his receipt for the money. That ended my entire connection with the case, and I know nothing from that day until the death of Mrs. Barnaby concerning Mrs. Barnaby's or Dr. Graves' affairs. I was requested to draw her will a few days after the day upon which the final agreement of compromise was signed. I said to her, "I don't think, Mrs. Barnaby, I would be in a hurry about drawing my will just yet." She replied that she wanted to go to Saratoga and desired to have the will drawn before she went away. She produced a memorandum upon which was given the way she wanted her will drawn, that is mentioning the legatees and the amount, and the disposition of her real estate which she had inherited from her father. After it was drawn and she had signed and the witness had signed, I put it in an envelope and sealed it up and directed it "The last will and testament of Josephine A. Bar-

may, to be delivered to Dr. T. Thatcher Graves upon my decease," and at her request put it in my safe. Mrs. Barnaby came in a few days after and said she wanted me to deliver it to Dr. Graves, and I handed him the will and took his receipt for it. I had no consultation with Dr. Graves or didn't see him or pass a word with him during the whole transaction. Mrs. Barnaby, barring her infirmity, which caused a halting of speech and halting of thought, was a very bright woman. It took her some time to express herself, but, giving her time and having a little patience with her, she was very clear and cogent in all her thought and expression; I think wonderfully so for one laboring under her infirmities.

Cross-examined. In October I received a letter from Mr. Bennett, written for Mrs. Barnaby, enclosing Dr. Graves' letter threatening her with a guardian. I did not answer it.

Mr. Stevens. You may explain why you paid no attention to that letter. I laid it, I think, before my partner, and we advised about the policy of interfering in the matter at all. We decided that we would not reply to the letter, and for this reason, that I knew Mrs. Barnaby had been accustomed to have the expenditure of large sums of money as her husband was a very wealthy man. I had in my possession some bills which had been sent in for settlement by the estate, which would be considered by persons of less wealth to be pretty extravagant bills. The fact that Dr. Graves was her confidant and financial and business manager suggested to me, as all

my official relations between attorney and client had ceased, that I had better not interfere. I concluded from that fact that Mrs. Barnaby was accustomed to expend large sums of money, she might be expending more than the condition of her estate warranted, and I felt satisfied this letter was only a caution and prudential measure on the part of Dr. Graves for her to spend less money, and I thought that I had better not interfere with it lest I might give offense to Dr. Graves and find myself in an unpleasant position with relation to Mrs. Barnaby and to Dr. Graves. I thought it was wiser for me to leave it where it was, and I laid the letter to one side and paid no more attention to it.

Mr. Stevens. You noticed that he stated to her that she could not sign a paper legally, that she could not borrow money, could not have anything charged no more than a six-year-old child, could not step her foot again in the Adirondacks because she could not leave town, she could not raise funds, she would have to live in the old home, for the executors said so and they knew. You thought it was merely a friendly caution on the part of the Doctor, and thought that she might be extravagant and you would not interfere. Yes. It was in connection with another occasion when Mrs. Barnaby had come to me and said there had been a threat to put her under guardianship, and I found there was nothing in it whatever. Did you think, Colonel, that either in Rhode Island or elsewhere it was professional to keep a letter of that kind, as you kept this, not returning it

to her, and not answering, but ultimately returning it to the defendant's attorneys in this case? There was no professional relation between us, and I didn't consider it of sufficient importance to pay attention to. Why didn't you give it to the State? The State never asked me for it. And they hadn't hired you? No. Why didn't you turn it over to the representatives of the estate of Mrs. Barnaby when she died? Because they were not entitled to it and I never was asked for the letter, if you mean Mrs. Barnaby's estate; it had no intrinsic value. Did you yourself Colonel, regard it as professional to give to Dr. Graves who had paid you no fee, the secrets of Mrs. Barnaby who had paid you ten thousand dollars for your services? I think when a man's life is at stake—

Mr. Stevens. Answer the question. I did not consider it unprofessional. When you were employed in this case were you employed to come as an attorney or as a witness? I was retained as an attorney in this case.

I gave Dr. Graves out of my fee \$500; our firm never received as large a fee as that before or since. I gave Dr. Graves that fee purely out of friendly feeling for him; he had sent Mrs. Barnaby to our office, and we acknowledged it by giving him this check.

Charles Clinton. Am cashier of the German National Bank. My business requires me to examine handwriting other than signatures. Have examined these letters and the label on this bottle. Should say the same person did not write them both. By

looking at the bottle, I should say the writer was a woman.

Cross-examined. I told you when you first called me in that I thought the writing on the bottle was written by a woman and that after upon closer examination I discovered similarities between the inscription and the letters of Dr. Graves. I also discovered a similarity between the writing on the bottle and Miss Hanley's writing. At this time I am not certain whether the writing on the bottle and that in Dr. Graves' letters are the same. But don't think it is the same.

William Thomas. Am receiving teller of First National Bank. My business compels me to study handwriting, but have not studied beyond signatures. Have examined the writing on the bottle and compared it with the letter of Dr. Graves. Formed an opinion. Was not summoned as an expert. Nevertheless, do not believe that the hand that wrote the letters penned the inscription. As to sex, could say nothing. Am not giving opinion as an expert. Decline to call myself an expert, but am capable of making comparisons in handwriting.

Joseph Bennett. Am a Denver veterinary surgeon. Arsenic with potash was a common remedy. It could be found about livery stables. It was a lotion, and was used internally. Was used as a lotion to promote healing, in warts and for other purposes. It possessed different degrees of strength used as a lotion, from two to twelve grains. I mix the solution according to a formula. In making these lotions no great accuracy was required. After the arsenic dissolved, its strength

is easily modified. It has been several years since I used arsenic, as I preferred other remedies. Do not think any skill was necessary to compound arsenic and potash, but to understand the English language.

Cross-examined. Am not a homeopathic horse doctor. Was first spoken to about this ten days ago. Had been a veterinary surgeon twelve years. Did not know what kind of poison I would have to testify about till I came into court. Arsenate of potassium was very easily made; no trouble about it at all. Three years ago was a great advocate of arsenite of potassium. Recently have changed off. Did not use it at all for glanders. Did not graduate at any college.

Dec. 24.

Niel Dahl. Am a druggist and chemist. Was educated in Denmark and graduated at Copenhagen. Do not know the defendant. Knew of the substance arsenite of potassium. It was used mostly as a medicine, as Fowler's solution. This was its exclusive use, almost. There were formulas for compounding all medicines. These were found in pharmacopeias, dispensaries, receipt books and chemical texts. The formula for making arsenite was simple. The formula for Fowler's solution was: Take one part arsenic, one part carbonite or bi-carbonite of potash, put in vessel and boil with ten parts of water; then add three parts of lavender and add water, in accordance with the strength desired to be secured. Anybody could buy Fowler's solution. Had sold it often to liverymen.

Cross-examined. Have never

sold any arsenite of potassium to a liveryman this side of the Atlantic in the years I have been here.

Mrs. Fuller. Was for a time the nurse of Mrs. Barnaby. Was in attendance on the poisoned woman. Went there at noon, the day after the ladies were taken sick. Found Mrs. Barnaby very sick. Vomited three or four times. I left at 11 that night. She complained of a pain in the side and great thirst. She was given no water. Mrs. Worrell's face was very red, and Mrs. Barnaby's was very pale.

Sallie Hanley. Live at Newport, Rhode Island. I first met Dr. Graves at a Grand Army fair at Providence about the middle of January, 1889. Before I went with Mrs. Barnaby was working at the Boston Store in Providence; met Mrs. Barnaby at Dr. Graves' house about the middle of May, 1890. Talked with her about going to the Adirondacks with her, and she asked about my wardrobe. She agreed to engage me on that occasion. Left Providence on June 23 with Dr. Graves and his wife, and went to New York. We met Mrs. Barnaby in New York. We arrived at the Adirondacks on 29th June. Was employed as a maid; dressed her and performed other duties that she required; did not have to work constantly. Mrs. Barnaby was in the habit of going out a good deal, especially on the lake; never went on the water with her; left her in December; never knew that there was any trouble between us; wrote her letters for her, but did not often read those she received. Had a talk with Mrs. Barnaby about keeping me in her employ some

time in October. She said she was going to stay in the mountains until Christmas, and I told her that if she wished I would stay with her, but that it would then be so late in the season that I couldn't get another situation, and that if she let me go then she ought to pay me a bonus of three months salary. She said she would, but if she decided to go to Cuba she would take me. If, however, she went to California she would not need me. We arrived in Providence in December. Mrs. Barnaby went to her house, and I went to the rooms of the Woman's Christian Association, where I boarded. Mrs. Barnaby received a letter while in the Adirondacks threatening her with guardianship if she did not do as Dr. Graves asked. She cried and said she

was very sorry she ever thought of buying a house, as it was expensive and she had no use for it, and that the Bennetts put her up to it. I have been studying dentistry. I had a salary from Mrs. Barnaby of twenty-five dollars a month and expenses; was not employed by the doctor to watch Mrs. Barnaby and report to him; rode horseback while in the mountains man fashion.

Cross-examined. Wrote to the Doctor in the Adirondacks on money matters maybe four or five times; wrote him about Mrs. Barnaby's idea of buying a house. I may have written her a letter saying that if she didn't pay me \$75 she would make me her enemy.

Mr. Pence. Did you not write this letter to Mrs. Barnaby? Yes, sir, it's my letter.

Providence, R. I., Dec. 17, 1890.

Dear Mrs. Barnaby—I was informed by the matron you had called to see me to say you were going to New York, and from there to California with a friend. This all seemed very strange to me. I could scarcely believe that you whom I placed such confidence in would go away in this manner. Now, Mrs. Barnaby, when we were at the mountains and spoke of remaining until Christmas, felt I must return soon in order to procure a situation for the winter, but afterwards started to remain with you there, as I knew it would be beneficial to your health and would also be a great pleasure to you and I have always tried to do all in my power to make you happy. At the time we decided to remain until Dec. 1, I said I should expect to remain with you this winter, as it would be too late in the season for me to get a situation when I returned, as you know it is very dull here after the holidays, and you agreed with me. Now, you return to New York, you refuse to take me with you this winter and have deprived me of a winter's situation, and, in fact, may be very late in the season before I could procure one, as business does not commence until May to amount to anything.

Mrs. Barnaby, this is a very serious matter. I have been a friend to you, and a staunch friend and you know it. I have always taken your part in every way and when you part with me as an enemy you lose your best friend. Now, Mrs. Barnaby, I ask for three months salary from Jan. 1st to April 1st, which will be \$75. Should you refuse to give it to me, my next plan is to call upon the executors

where I shall tell the whole story from beginning to end, and you know there has been lots of things happened you would not care to have these people know, for should they know it, it would make a great deal of trouble for you, and it is possible, Mrs. Barnaby, you would like for me to tell them how you have spent your money this summer and all the trouble it has caused, of which I promise I shall do if you refuse to give me my salary. Remember, Mrs. Barnaby, should the word guardian be brought up again in regard to you, undoubtedly the executors would call upon me as a witness, and I am quite sure you would rather have me as a friend than an enemy. This matter must be settled at once or I shall appear in person. Please answer by return mail. Yours very truly, S. S. Hanley.

Dr. T. Thatcher Graves. Am a physician and surgeon; graduated in 1871 from Harvard Medical College; moved to Providence about five years ago. In the spring of three years ago, a lady came into my office and introduced herself as Mrs. Barnaby, and asked me for the privilege of using my telephone. My wife was present. I have no recollection of saying anything to her at that time in relation to my specialty or any specialty. But within a week she came into my office and consulted me in relation to her ailment, paralysis. My income at the time I became acquainted with Mrs. Barnaby was between four and five thousand dollars a year. My professional connection with Mrs. Barnaby lasted up to the time of the death of her husband in September, 1889. Mrs. Barnaby came into my office on Saturday evening, the week of the funeral of Mr. Barnaby, and said she had come for some medicine, that her daughters wished her to go to Saratoga, that her trunks were packed. I asked her how she liked the will. She said she had got to like it because Mr. Winship and her daughters and the family had explained to her that there was nothing else to do but

accept it. I said, "Well, Mrs. Barnaby, I am not so sure about that." She then asked me what I thought. I told her I didn't know, but I would advise her to consult her friends and lawyers the following Monday or Tuesday. She came to me and said she had been consulting with her family and friends; that they advised her, as she expressed it, to stand up for her rights. She said that Robert Sherman had advised her to consult a lawyer. But she had learned that a son of this lawyer had been paying some social attention to her daughter, and she didn't want that lawyer. I said why not consult Ballou & Jackson. She asked me if I would telephone to Mr. Ballou. I did so. Mr. Ballou came to my office. Mr. Ballou advised her to consult with her friends and she left. That week she came into my office again and informed me she had placed her matters in the hands of Mr. Ballou.

Mr. Furman. You heard the testimony of Mrs. Hickey that Mrs. Barnaby had told her that you had advised Mrs. Barnaby in the event she could not get her rights to make an affidavit that her daughter Maud was not the child of her husband, J. B. Bar-

naby? I never heard of it until I heard of it in this court. You heard the statement of Mr. and Mrs. E. S. Worrell, Sr., to the effect that Mrs. Barnaby had stated to them that you had informed her that her husband, J. B. Barnaby, had left a legacy of \$100,000 to some woman who had been his mistress. I never heard of that, sir, until I heard of it here in this court. Never said anything against her dead husband or her family, for I didn't know anything. I became Mrs. Barnaby's agent a short time after the matter was settled in the courts. Mrs. Barnaby said she and Col. Ballou had been to Robert Sherman to get him to act as her agent; that he declined, and she asked me would I be her agent and I said I would not, that I was too busy. She pressed me to be her agent and I declined a second time. I then for various reasons accepted it. Besides the power of attorney she executed in December, 1889, she gave me in the next May a paper which said: "I hereby authorize and direct my agent, T. Thatcher Graves, M. D., to invest and care for all my moneys or other property in any manner which shall seem best and advisable for him." Outside of the legacy from her husband's estate she had money in the bank and real estate which paid in rents \$80 per month. Mrs. Barnaby had in the savings bank \$4,000. After the will contest, Mr. Ballou came to me and said, "Doctor, we feel under obligations to you for your efforts in securing Mrs. Barnaby as our client. Allow me to present you with \$500." I never was more surprised in my life sir—there had not been

any sort of understanding with Col. Ballou. I was not to receive any compensation or any share of their fee at all. I never made any demand of any sort on them. Mrs. Barnaby never at any time informed me as to what amount she had left me in her will; never asked her. Col. Ballou handed me the will sealed. I never opened it, but kept it in the safety deposit vault in Boston.

Received a letter in January of this year from Mr. E. S. Worrell asking for the will. Did not send the will. Was in Boston; it wasn't convenient for me to go and get the will; the time was scarcely sufficient for me to send the will, as I understood Mrs. Barnaby was to leave Chester. I sent Mrs. Barnaby checks because it was the most convenient way and it was a receipt. She objected in California that she had some difficulty in getting them cashed, but that was her fault and not mine. Mrs. Barnaby said to me that she wanted a traveling companion; she did not want a maid; she wanted a young lady that could be a companion with her. I told Mrs. Barnaby that I knew a young lady that I thought would fill the bill and arranged with her to meet Miss Hanley. She did meet her and engaged her. I received the letter from Miss Hanley in which she told me that it was rumored that Mr. Bennett had succeeded in getting Mrs. Barnaby to purchase a house, that Mr. Bennett wanted Mrs. Barnaby to sign a paper. I spoke to Mr. Anthony in relation to it, told him how much trouble I was having from Mrs. Barnaby's extravagant habits; that I was sick

of the whole business, and that it seemed to me that it would be advisable that Mrs. Barnaby should be put under guardianship. Mr. Anthony said, "Better not." I then wrote this letter to Mrs. Barnaby that if she did sign papers or anything of that kind, there was danger that she would be put under guardianship.

There was an agreement between me and Mrs. Barnaby that I should receive for representing her \$2,500 a year.

Mrs. Barnaby was very sensitive in regard to the fact that in her conversation she would now and then want a word, and for a moment there would come a halt; I chanced to give her some medicine which she fancied relieved it; whenever Mrs. Barnaby would get out of the medicine she would send to me for it and I would send it in wooden cylinder cases, as is my custom to send out much medicine. I have a great deal of experience in mailing medicines through the mail in these wooden cases. For the past two years, most of the time while in Providence, I used from \$5 to \$10 worth of stamps a week; have seen these stamps exhibited in court. I did not purchase them; I do not use them. I did not receive any letter stating when she would be in Denver except one. Was in a suburb of Boston when I received a telegram from Edward S. Worrell, Jr., sent to me in Providence and forwarded to me by my mother that Mrs. Barnaby was sick here in Denver and if I wished to see her to come west at once to Providence. I telegraphed from Boston to keep up good courage, I am com-

ing, and made preparations to come to Denver. Just then a telegram came that Mrs. Barnaby had died at 2 o'clock that afternoon. I went to the station and could not purchase a ticket for Denver, as they didn't have one. I got a ticket for Chicago, via New York; the Central road. I left a little after 1 that night; got to Chicago next morning about 10:45; I stopped first at Sterling, Ill. Mrs. Barnaby being dead, I thought I would stop at my uncle's two or three hours and then come on to Denver. Arrived in Sterling about 4:15 Monday afternoon. I didn't come to Denver that night on account of the mud being so deep we could not get back in season to catch the train, very much to my disappointment. I sat in the station until the train came along about half-past 9—an accommodation train; boarded it and went to Cedar Rapids. I had a cousin, superintendent of a railroad, there, and being late, and the train I was on didn't go through to Denver, I decided I could stop off and see Robert Williams. I got to Cedar Rapids towards morning, and then to my surprise I learned that the next fast train for Denver would not leave Cedar Rapids until 8:40 that night. I took the next through train and arrived here Friday morning; went to the Gilsey House and then to Mr. Worrell's residence. I saw young Mrs. Worrell, the elder Mrs. Worrell and the lady I presume is the grandmother. I was under the impression so firmly that Mrs. Barnaby had died from a shock that I said I presumed that Mrs. Barnaby had died from a shock, to which one of the ladies re-

plied that it was worse than that—that she had been poisoned. I was very much surprised, and then the conversation ensued in relation to the cause of her death and manner of her death. I then went to Mr. Worrell's office. I said that this was sad business and asked him if there had been an autopsy and he informed me there had. That the autopsy had shown that Mrs. Barnaby died from congestion of the lungs. Up at the Worrell house they informed me that Mrs. Conrad was in town and I was very much surprised. I asked Mr. Worrell as to paying the bills. "Everything is paid," he said. "Tickets are all bought, the party is all going tonight, only waiting for you." He asked me why I didn't get there, and I was much chagrined to be obliged to say I had stopped over. I asked where the body was, and they said at Mr. Rogers' already for shipment, "That it was in the case, all ready for shipment." I was very, very much shocked when I learned Mrs. Barnaby had been poisoned; I presume I acted nervously. I did not go to the undertaker's and see Mrs. Barnaby's body because they told me it was cased up for shipment. Leaving the Worrell office I spent the rest of the day with John Dalzell. I accompanied the remains as far as Jersey City. I saw Mrs. Conrad a number of times, but didn't intrude myself upon her. I left the funeral party, but through no fault of my own. When we stepped off the train Mr. Winship was there, and says, "We have just time to get across to catch the train." Mr. Clark and myself took the grip sacks, Mr. Winship was to

attend the transportation of the casket. Mr. Clark and myself went on board of the ferry boat; we had hardly got on to the ferry boat when we saw they began to cast off, and Mr. Clark says to me, "I will run back and hurry them." He stepped off the boat and the next instant the boat started. I turned over the baggage to the expressman, who agreed to take charge of it until the funeral party came over. I crossed to the city of New York, and just caught the train. I waited at the train a few minutes to see if it was possible the funeral party would catch up, but they didn't arrive in season so I took the train for Providence where I arrived that night about 10 o'clock. Went to my house. I found that my wife had received a telegram purporting to be signed "Thatcher" which I had not sent her and I went to the telegraph office and telegraphed to my wife at the Bay State House. When I entered the telegraph office I was in a very excited condition, and I felt that somebody had decoyed my wife away, and I said something to the effect that if the man was there that sent the telegram I would lick him. He said something, I don't know exactly what, which provoked me into saying that instead of charging the affair to me the Barnabys better look nearer home; that the conduct of Mrs. Barnaby would not bear investigation, or something of that kind.

Saw Mr. Lincoln and Mr. Trickey at my residence the following morning. One of them commenced asking questions, principally in relation to my trip out to Denver, my stopping

off at Chicago, Sterling and Cedar Rapids. I refused to be interviewed, but they persistently fired questions at me, and it didn't seem to make any difference whether I answered them or not, and I opened the door and said, "Gentlemen I must decline to be interviewed," and I was not interviewed, and they were obliged to leave.

Saturday night Mr. Conrad came to my house and said that he had read the letter as he expressed it when a man was manly enough to apologize for a wrong, he, Mr. Conrad, was ready to meet him half way, and he so desired to meet me, that had he met me in Denver all this stuff would have been kept out of the papers; that he would be pleased if I would come over to his house and talk the matter over as business men in a business-like way; I said I would, Mr. Conrad, and me went to the Barnaby house.

He stated that his brother Charles had come on; that he was heartbroken over the affair, and that his brother Charles wanted to talk the matter over too. Mr. Conrad gave directions to the driver not to drive by the ordinary route, but to go a round-about route, which we did go, saying that he did not wish the reporters to know we were going there. Mr. Conrad introduced me to brother Charles of Petersburg, Va. I said to Mrs. Conrad that knowing my wife had been decoyed away and under the stress of what I had read in the papers I had been led into saying a few indiscreet words regarding her mother, that the published accounts in the papers were entirely wrong, magnified,

distorted, changed. Mrs. Conrad accepted my apology in a very few words. At Mr. Conrad's suggestion that the parlor was too large we adjourned to the library. I am under the impression that Mrs. Conrad was present in the room during the evening. We talked of Mrs. Barnaby's death, of her trip to the Adirondacks, of my care in a general way, acting as her agent. Along in the evening after talking an hour or more, Mr. Conrad said suddenly, "Van Slyck says that there won't be any estate, or that you have squandered the estate, or words to that effect." I became annoyed at the expression and I said, "Now that is not so, if you will go to my house with me right now, my books, my papers, my investments, everything is at your service to examine." After some conversation Mr. Conrad accompanied me to my office that night. I showed him my list of investments, what I had got, what I had done with it, and he expressed himself as perfectly satisfied as we went through it. I said to him, Mr. Conrad, these accounts show that there is about \$70,000 in stocks and bonds. They are in the Safety Deposit Vault in Boston. "Now," I said, "you go with me and take an inventory of those." No, no, he would not; he didn't want to. He said that he was satisfied with the showing of the list which I had.

The next evening Mr. Conrad came to the house again, and wanted me to come over and talk the matter over still further to his brother Charles; that Charles thought it would be best for Mr. Conrad to go to Boston with me.

I went over to the house, was ushered into the library and brother Charles was present and made arrangements with Mr. Conrad to go to Boston the next morning.

Next morning I went to Boston and met Mr. Conrad at the Safety Deposit Vaults. I showed him everything I had, stocks, bonds, everything that I had, without any reservation; he sat there and expressed himself as perfectly satisfied, both with the character and the extreme low price at which the stock had been bought, and I told him at that time that according to my brokers I had probably made for Mrs. Barnaby a clean \$10,000 on the investment. Mr. Conrad said repeatedly, "Dr. Graves, you are entitled to credit instead of censure for the manner in which you have administered upon Mrs. Barnaby's estate." Of his own accord he said, "I will publish a statement before I leave. Dr. Graves, you draw up a memorandum of a statement and I will sign it." We parted mutually pleased with each other as I supposed. He said that if I would draw up a statement he would send a carriage over for me to come over that night, Monday. I went over there Monday night; drew up a statement and took it with me that night. Mr. Conrad seemed to be in excellent spirits; he and I detailed what we had done in Boston. Mr. Conrad appeared to be quite anxious to draw up the paper, using my memorandum as a basis. Charles Conrad seemed to think he better not hurry; it would be better to get the value of the stocks and bonds. We talked prin-

cipally that evening in relation to Mr. Conrad's life in Montana, of his ranch, of his mines, of his political aspirations. He said he was in trouble because his miners had struck, and he was in a hurry to return to Montana; he wanted to get rid of the whole thing, and get out of it and get back home on account of this strike, and the fact that his business was suffering. He said that he was determined to become Governor of Montana, and then Senator from Montana; that he was sure of being Governor, and sure of being Senator; that he was the leader of his party; that no nomination could be made in Montana, without he, Mr. Conrad, said that it should be; that he had spent \$25,000 the year before; that he presumed he should spend a good many twenty-five thousands; that he had the money and was perfectly ready and willing to do it. Then he said he believed the death of Mrs. Barnaby had been caused by accident, that somebody must have sent her a bottle of whiskey, and it either had been tampered with or in some way that he could not explain it had been changed. He asked me if I had ever sent a bottle of whiskey to Mrs. Barnaby. I told him I never had sent her any whiskey. We all three discussed who could have had a hand in the poisoning of Mrs. Barnaby; Edward Bennett's name was mentioned; I said I had no idea that Edward Bennett had anything to do with it. Mr. Conrad kept during the evening continually saying that he thought the Worrells knew more about it than they wanted to explain, and spoke of the secrecy that had been shown and

other things of that kind which would rather tend to throw suspicion upon the Worrells one way or the other. But we talked up to pretty near 11 o'clock.

Mr. Furman. State whether or not during that Monday night you stated to Mr. Conrad that you had sent to Mrs. Barnaby a bottle of pure whiskey? I did not. Did you see any whiskey there Monday night? Oh, yes, oh, yes; they hit it pretty hard. Mr. Conrad and Charles. Did not drink any Monday night. I was asked in the ordinary polite manner. Tuesday night I went there again. Mr. Conrad appeared to be pretty full. Charles was there; he was not in the room very much; he would saunter in and out. He accosted me as "You God d——d old Puritan, you have got to take a drink now," and I did take one. He said his wife was sick and tired and wanted to get back home, and that he was sick and tired of the whole business, and he suggested that he was sure somebody had sent a bottle of whiskey to Mrs. Barnaby and before a great while he confided to me that he would give \$25,000 to any man that would say he sent a bottle of whiskey to Mrs. Barnaby. I thought it was simply drunken talk, although he was not drunk at the time, but I considered it mere bosh and talk. He asked me if I supposed Edward Bennett would say that he had sent a bottle of whiskey to Mrs. Barnaby. I said I did not, that Edward Bennett was not that kind of a man, that he might have his failings, but he would not say so. He said that his political prospects in Montana would be ruined, unless he could go back

to these different politicians whom he named over and could say to them, "Now, gentlemen, this is all a mistake, the papers have made a mistake, Mrs. Barnaby has not been murdered, a bottle of whiskey was sent to her, but Mrs. Barnaby has not been murdered." That he could go back to Montana; that he could say that he could hush the whole thing up, and he could go back clean and whole before his constituents, and that he would not be ruined—his prospects of being Governor of Montana. He finally became very confidential with me. He said, "Now Doctor, you can help me out of this; you did send a bottle of whiskey to Mrs. Barnaby." I said, "No, sir; I never did." But he says, "You let me say so, don't you deny it." I said, "No, no, Mr. Conrad, I never sent a bottle of whiskey; I can't do that." Then he would take another tack, then he would talk about Montana, and he either drank or appeared to drink a number of times, and appeared to be quite under the influence of liquor, and finally he said to me, "Doctor, let us let the whole thing go, come on to New York and let us go on a spree together." That conversation was kept up through Tuesday evening repeatedly; over and over again, he attempted to get me to say that I had sent a bottle of whiskey, but I told him that I had not, and tried to pacify him and get that out of his head; that is the gist of what took place Tuesday evening. Charles now and then would put in a word or hear some of it, but he wasn't in the room not more than a quarter of all the time. I told brother Charles that he

must get that idea out of John Conrad's head, that Conrad was certainly harping to me to get me to say I had sent a bottle of whiskey. I said to Charles "I never sent a bottle of whiskey, and you know it and I know it; I never did. Now you must get that idea out of John Conrad's head." I next saw him on Thursday night. I didn't go Wednesday night. I had been very busy through the day, and was tired. About 11 o'clock Wednesday a gentleman called at my house with another gentleman and said that he was Mr. Van Slyck, and that he had been appointed custodian to receive the Barnaby property. He says how soon, or when would it be convenient for you, Dr. Graves, to turn over the property? I said, "Now." And I turned it over that day. Took his receipt. Thursday night as soon as we had got comfortably seated in the library, I spoke of the Chester will and the Ballou will, and I felt from John Conrad's manner that there was a change in his manner. He said to me, "Now, Doctor, in relation to the bottle of whiskey which you said Tuesday night that you had sent." I said, "No, John Conrad, I never said so." But you did." "No, John Conrad, I never said so." Upon that he flew into a passion, or pretended to, and said, "You did." I said, "No, sir, I didn't." He then controlled himself and sat down and commenced talking and said: "You certainly did say so Tuesday night." I said, "No, sir. If I had said so I would know it. I never sent a bottle of whiskey." "But," he says, "you said you did. My brother Charles will swear to it, too." I said, "Well,

I certainly never said so. I never sent a bottle of whiskey to Mrs. Barnaby." Then he dropped that tack and began to wheedle me. He says, "Now, Doctor, you must help me out of this, you must acknowledge you sent this bottle of whiskey; now I want you to sign this paper," that I had sent a bottle of whiskey. I said, "Oh, no, no, sir." He then went on to say that it should not be used against me; he just wanted it to show to his brother politicians; he wanted to take it back to Montana; he would just take it back to show his brother politicians that a bottle of whiskey had been sent. He tried every art of persuasion to persuade me; he didn't show me the paper, but I was under the impression that he had gotten a paper drawn up which he wanted me to sign. I told him, "No, sir, I cannot do it." Having tried to persuade me, coax me, he then proceeded to threaten me. He says, "Dr. Graves, if you don't sign the paper I'll have you arrested." That made me mad and I said, "Mr. Conrad, if you have me arrested for this," I don't remember my exact words; I presume he is correct in what he said that I would dig up the scandals of the Barnaby family; I did say something to that effect or of that nature; he simply made me mad and I did say something of the kind; upon that he flew into a perfect passion like a mad bull and he raved and stormed about the room and swore if I didn't help him he would have me arrested and bring me here in irons to Denver, and he said the East is your country, the West is mine; if you are taken to Denver I will pack a jury on you,

you will never have a fair trial, for with my money I will buy up a jury and you will be convicted anyway. He calmed down after a while; he then started again and said: "Dr. Graves, I have given a \$20 bill to ten different reporters. The Boston Herald I have bought up body and soul; they will do just as I tell them to do; the Boston Herald you know is one of the principal papers and it has a good deal of influence." He then tried in every way that he could to get me to sign a paper that I had said I had sent a bottle of whiskey. I tried to pacify him and I tried to say to him, "Mr. Conrad, it is no use talking. I never sent a bottle of whiskey, I never shall say so in the world, for I never did. I can't help you out in this." Finally the words became so high between us that Charles Conrad came into the room and immediately after he entered he said, "Brother Charles, didn't Dr. Graves say that he sent a bottle of whiskey." Brother Charles said, "Yes, he did." I said "Oh, no." John Conrad left the room. I said to Charles Conrad: "Mr. Conrad, you must get this idea out of John Conrad's head; it is no use talking about it;" then John Conrad came back into the room and something more was said. Charles Conrad said, "Doctor, you will surely be arrested and taken in irons to Denver." John Conrad then said, "Doctor, which is best, for you to go to Denver in a palace car with me, or go in irons, for we will both of us swear that you did say that you sent a bottle of whiskey to Mrs. Barnaby." I turned around to face them both, and I said:

"You call yourselves Conrads of Virginia. So help me God, if you two men go to Denver and swear my life away, I would rather be the prisoner at the bar than be you Conrads of Virginia." I says, "Now I propose to leave this house." They both of them tried to quiet me down, but I went immediately home. That night I sent a telegram to the Denver District Attorney. I stated that I desired to appear before the grand jury. I did not appear before the grand jury. I was prevented from appearing by my lawyers. Saw Mr. Conrad again the next afternoon about 4 o'clock; my door bell rang and I went to the door and Mr. Conrad was there. I said, "Mr. Conrad, my wife and myself are going to Denver." He says, "That is good; I will go with you." I said, "I don't care to have you go with me, Mr. Conrad," and I closed the door.

Mr. Furman. You heard the statement of Charles Conrad, alias Hanscom, that you admitted you had sent a bottle of pure whiskey to Mrs. Barnaby, in the presence of John Conrad, but as soon as John Conrad left the room you said, "I did admit it, but it is a d——d lie." I will ask you to tell the jury as to whether or not you ever made any such statement as that to Mr. Hanscom or brother Charles. I did not. I said to Charles Conrad that it was a d——d lie; that Mr. Conrad had said that I had sent a bottle of whiskey and I said, "It is a d——d lie, I never did."

You have heard the statement of John Conrad to the effect that you admitted to him that you had sent a bottle of pure whiskey

to Mrs. Barnaby. I never did in my life. I never sent a bottle of whiskey to Mrs. Barnaby in my life, and I never made the admission. When was the first time that you ever saw this bottle that has been figuring in the case? In this courtroom. I had never seen it before in my life to my knowledge.

You heard the testimony of Mrs. Hickey to the effect that you had stated to her once that you knew that just as soon as Mrs. Barnaby returned to Providence that it was her intention to take her money and property and carry it to the Bennetts. State to the jury as to whether or not you ever made any such statement to Mrs. Hickey? Never. State whether or not you were ever on confidential terms with Mrs. Hickey? No, sir; I regret to say I was not on confidential terms with Mrs. Hickey. Please state to the jury what knowledge you had if any prior to Mrs. Barnaby's death of any dissatisfaction upon her part with you other than with reference to sending her checks, if you knew of anything else besides that? I did not.

December 26.

Cross-examined. I was born on 29th January, 1841. I lived in Danielsonville, Conn. I went to Providence in 1877 because I thought I could get into a better practice than I had at Danielsonville. Have been in the habit of mixing and selling my own medicine, and ship it to different parts of the country. My office is in the basement of my house; it has been used for an office for nearly 40 years by physicians. When I received word of Mrs.

Barnaby's sickness talked the matter over with Mrs. Graves about the advisability of making the trip to Denver. We were both of one mind it was my duty to come. When I received the second telegram I felt it was my duty to go to protect her interests. I knew that Mrs. Barnaby was possessed of valuable diamonds. I supposed her to have \$20,000 worth of diamonds. I didn't expect when I arrived to see Mrs. Conrad; it was a marked surprise to me. The first thing that caused me to be nervous and agitated in Denver was upon learning that Mrs. Barnaby had been poisoned. I may have told Mrs. Worrell when she asked me "What has caused your delay, Dr. Graves?" "I have been detained for fear that I would have the grip in Chicago and missed connections at every place." I spent the day from the time I left Mr. Worrell's office with Mr. Dalzell. I went out driving, and I wanted to go to a ball game; he took lunch with me, and I took dinner with him. During this time did not attempt to find out anything with reference to the poisoning which had been administered to Mrs. Barnaby, with reference to the examination of the doctors had of the bottle, or to see the physician in attendance, or anything except what I have related. After repeatedly asking if there was anything I could do, and asking to be allowed to do something, and being assured that everything was done, there was nothing left for me to do. Did not say at the house when I learned this package contained an inscription "From your friends in the woods," "Unquestionably it is from the Bennetts."

I never supposed Bennett sent it; never have and don't now. I didn't tell Mr. Worrell that Mrs. Barnaby and the Bennetts had a terrible row, and Mrs. Bennett had forbidden Mrs. Barnaby to come there again. But under this nervous strain I might have stated it. I have no recollection of it. Don't think I told Mr. Lincoln that Mrs. Barnaby had many lovers, and some of them were vile. I have no recollection of saying it. I might have said it. Didn't tell him that she had trouble in the ice house in the mountains, and I had looked through a crevice in the ice house and had seen her and Edward Bennett in a drunken condition. I never made such a remark in my life, never. I never saw her drunk with him. I never saw her drunk in my life. I knew she was in the habit of taking whiskey in small quantities as a tonic. I personally never saw her drink to excess. I may have told Mr. Lincoln that I could not conceive who did commit this crime. I may have said to him, "No one can tell what a source of trouble she has been to me." That I was begged and pleaded with to become the agent three times; have recollection of saying that. Mrs. Barnaby was erratic, I very likely said; did things that excited talk and made reasonable grounds for some of the scandals which were afloat about her; and also in effect that for the sake of the family I had tried to suppress these things. I did say that it was for the sake of the Barnabys that I remained silent and didn't have anything to say about these matters. When I said that I had lost a good salary by Mrs.

Barnaby's death, I may have said that it was all "bosh" that I ever attempted to influence her to make a will. I stated to Mr. Lincoln that I didn't know the cause of death until Mrs. Worrell told me in Denver. I do not remember what my part of this conversation was with these gentlemen the next morning. I do not, except I told them I would not be interviewed. The two reporters did not call my attention to the fact that the papers that morning had published certain things, and I didn't explain to them voluntarily about that matter. I positively did not. It is made up out of whole cloth, every word of it. I never used in my practice any preparation of arsenic except Fowler's solution, and an ounce would last me a long time. Don't know that I have bought any medicine in Boston in 20 years. I bought all of my medicines in Providence. In sending out these compounds of mine I bought different kinds of medicines. My business has increased in the last two years, until this thing broke it up. I didn't want Mrs. Barnaby to purchase a house in the Blue Mountains. I didn't know how she was going to pay for it. Mrs. Barnaby was a friend to me, I was surely a friend to her; it didn't seem best for her to tie up money in unproductive property in the mountains. Have known Mrs. Mary Hickey a number of years. She has done work for me at my house.

Dec. 28.

Dr. Graves. I never said to Mrs. Hickey if Mrs. Barnaby undertook to take her property from me I would put her either

under the control of a guardian or in an asylum. The stamp on the bottle (one sent Mrs. Barnaby) "H. T. & Co." means Henry Thayer & Company. They put up medicines, so I understand. Their place of business is Boston. I think they manufacture their medicines at Cambridgeport; when I was in the hospital certain of their medicines were used; I never have

used any since. There are a great many of these bottles in New England. Haven't seen them in my practice of medicine. It is a regular medicine bottle anyhow, from the looks of it.

Mr. Furman. I don't think I care to re-examine Dr. Graves. That is all, Doctor. I am satisfied with his cross-examination.

Mr. Furman said he desired to ask certain questions, and the jury was excused so that their admissibility might be argued.

Mr. Pence. It is proposed to recall Daniel Smith, who was on the stand three weeks ago, to ask him if he made statements to six other persons, and then calling these persons to impeach him. I am informed influences have been at work to get him to take the stand and swear that he drank from the original bottle. They have had plenty of time to investigate this man. Every visionary theory of the defense has fallen. They have to have a new one. He is a witness for the prosecution. He is here under a special officer chosen by Mr. Furman. He is brought under process against his will. I talked to him, and I think the Court ought to investigate who has been working with this man and how hard. Two weeks ago he was on the stand. He made the alleged statements before he went on the stand. In view of all the theories of the defense, is it not strange that these remarks should now be discovered? An investigation should be made.

Mr. Furman. Mr. Pence's first remarks need no reply. We have not shifted our defense. Our defense all along has been innocence. Our statements show we had no knowledge of his statements till after we opened our case. He made them to four persons. There was a Dan Smith in the list of witnesses, but before we went to trial we wanted additional time. We have been as busy as we could be. One of the counsel has been sick. We do not object to an investigation. But that would go to credibility and not to admissibility. Counsel for the State would have an opportunity to attack the credibility of the witnesses before the jury. The evidence of Smith was adduced to prove the integrity of the bottle. If we can show he drank out of the bottle of course we impeach him, for he swore to the integrity of the bottle.

Mr. Belford. Your Honor, this evidence has no place here. It ought to be used, if at all, to insist on a new trial on the ground of newly discovered evidence.

JUDGE RISING. No; it's entirely in the discretion of the Court.

Mr. Belford. The discretion Your Honor has in mind, and I have in my mind, is as to the credibility to be attached to affidavits pre-

sented on an application for a new trial. Before this motion should be granted, the Court should have an inquest.

Mr. Stevens. The defense had six months to prepare. They knew that we would have to have the bottle and prove the integrity of the bottle. They should have prepared for this.

Mr. Furman. If this Court rules out this evidence we could not use it to secure a new trial on the ground of newly discovered evidence. In granting new trials, the law is that such motion will never be granted to impeach a witness. It seems to me the view is this: Smith was called to prove the integrity of the bottle. If we had known it at that time, could we have asked him: "Did you state to E. R. Bertram that you drank out of this bottle?" We had the right then; why not now? If improper influences have been brought to bear, I don't object to an investigation. I appeal to the sound discretion of this Court.

JUDGE RISING. There are some things which could be gone into under no consideration—what he said after. I have no doubt this Court could permit you to ask the other questions now. The questions of influence go to the credibility. You can ask the one question as to whether he made the statement.

Mr. Stevens. Are they bound by the answer of the witness?

The COURT. No, sir; it is cross-examination.

The jury was brought in.

Dan Smith. Have heard the testimony in this case; remember the box in Mr. Worrell's buggy; know E. R. Bertram; he works at the Empire stables. A week before I was on the stand I did not tell Mr. Bertram that I took a drink out of the bottle in Mr. Worrell's buggy; know James White; he works at the same stable; on Thursday before I was on the stand did not tell him that I knew a bottle was in that box; know Jim Mack; he works at the Empire stables; didn't tell Jim Mack when we were returning from dinner that I had the bottle in my hand and came near taking a drink. Know Charles Linn; didn't tell him I took a drink from that bottle.

Mrs. Graves. Am the wife of the defendant. When we became acquainted with Mrs. Barnaby we were living in six rooms, originally designed for a bache-

lor doctor. She called at the house one day and asked to use our telephone, and I introduced my husband to her. Mary Hickey was not there at that time. After my husband returned from Denver Mr. Conrad came to the house and introduced himself. I asked him how his wife was, and he said she was very badly broken down. He asked my husband to go to his house for a business talk, and he went. I saw him the next night, Sunday, and asked again for his wife, and was told she was still ill. My husband went with him again that night. I did not see Mr. Conrad again, but I heard him call at the door and speak to my husband. The doctor told him he was going to Denver, and Mr. Conrad said: "That's good; I'll go with you." My husband said he preferred to go alone and shut the door in his face. My

husband first employed lawyers when he arrived in Chicago, en route to Denver. He telegraphed to Mr. Dalzell to do it for him. Something he saw in the morning papers in Chicago caused him to do so.

Mrs. Graves, Sr. Am the mother of the defendant. I live with my son. Saw Mrs. Barnaby last December after returning from the Adirondacks. She stayed three nights at our house. She showed the kindest feeling toward Dr. Graves. She came to my room twice and wanted me to urge the doctor and wife to go to California with her. My son said he couldn't go. She said if they couldn't go to California with her they'd have to go to Europe with her; was at home when the telegram came saying Mrs. Barnaby was sick. Sunday morning forwarded it to Dr. Graves. He was bidding me goodbye when news came announcing the death. He left at once for Denver. Saturday night, 2d of May, saw Mr. Conrad. He asked the doctor to go to his house. While the doctor was getting ready he talked to Mrs. Graves. He said this was the worst trouble his wife ever had; that his brother Charles had come from Virginia and was completely broken over it.

"Mr. John Conrad, The Albany, City.

"John Conrad:

"Members of the Barnaby family will leave Providence to volunteer to take all of the skeletons out of the family closet—Mrs. Conrad's and all of them. Be on the lookout. They are mad at you and you will tell all that they know. Be warned and be on the watch, for they are coming. They leave Providence either Friday or Saturday night.

A Friend.

"They volunteered to come to Ballew, for they hate you. They will try to prove that your wife tried to elope with Winship before you knew her and other very bad things."

E. R. Bertram. Am employed at the Empire stables; know Dan Smith, and about a week before he went on the stand he said that he had taken a drink out of the bottle, and that it would not hurt a baby.

Cross-examined. Came to Colorado year ago last May from Chicago. Was arrested here for obtaining goods under false pretenses.

James Mack. Live in Denver; work in the Empire stables; know Dan Smith; heard him say he came near taking a drink out of the Barnaby bottle.

Jimmie White. Work at the Empire stables; know Dan Smith. One or two weeks before he testified Smith said he knew there was a bottle of whiskey in Worrell's buggy, and you see how easy it was for any one to tamper with it.

Mr. Lockwood. Am cashier of the Union Bank; had been called on to examine Dr. Graves' handwriting; believe the threatening letter sent to Mr. Conrad Dec. 4 was written by Dr. Graves; it was possible for an expert to counterfeit handwriting till the counterfeit could hardly be distinguished.

The State offered the letter as evidence:

THE COURT'S INSTRUCTIONS.

JUDGE RISING. Gentlemen of the Jury: The indictment upon which the defendant, T. Thatcher Graves, is being tried, contains three counts. In the first count of the indictment, the defendant is charged with having on the 19th day of April, 1891, feloniously, willfully, deliberately, with premeditation and of his malice aforethought, killed and murdered one Josephine A. Barnaby, in the county of Arapahoe, in the State of Colorado. In the second count of the indictment the defendant is charged with having feloniously, willfully and of his deliberate premeditated malice aforethought killed and murdered one Josephine A. Barnaby in the county of Arapahoe, in the State of Colorado, by having on the 13th day of April, 1891, feloniously, willfully, deliberately, with premeditation and of his malice aforethought administered to and caused to be taken and swallowed by the said Josephine A. Barnaby, a deadly quantity of deadly poison called arsenic, from the taking of which poison the said Josephine A. Barnaby became sick, and from which sickness she died on the 19th day of April, 1891. The third count of the indictment differs from the second count in substance only. in that it charges the defendant with having caused said deadly poison to be administered to and taken and swallowed by said Josephine A. Barnaby, instead of charging the defendant with having administered said deadly poison to said Josephine A. Barnaby and caused the same to be taken and swallowed by her.

The COURT instructs you that murder, defined by the statute, is the unlawful killing of a human being with malice aforethought, either express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears or when all circumstances of the killing show an abandoned and malignant heart. The statute provides that all murder, which shall be perpetrated by means of poison or lying in wait, torture or by any kind of willful, deliberate or premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, mayhem or burglary, or perpetrated from a deliberate or premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, or perpetrated by any act generally dangerous to the lives of others and indicating a depraved mind, regardless of human life, shall be deemed murder of the first degree, and all other kinds of murder shall be murder of the second degree. The statute further provides that the jury before which any such person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first or second degree. The words "malice aforethought" in the indictment and in the statutory definition of murder as herein given do not imply deliberation or premeditation.

The COURT instructs you that the law presumes the defendant innocent, and this presumption continues until overthrown by evidence sufficient to exclude all reasonable doubt of his guilt. The indictment against the defendant is no evidence of his guilt, but is merely a formal charge for the purpose of putting him upon trial. You ought to commence the investigation of the case with the presumption that the defendant is innocent of the crime of which he is accused, and you should act upon this presumption throughout your consideration of the evidence unless this presumption of innocence is overcome by a proof of guilt so strong, credible and conclusive as to convince your minds beyond any reasonable doubt of his guilt. Then you ought to convict him. This rule of law, which clothes every person accused of crime with a presumption of innocence and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid anyone, who is in fact guilty of crime, to escape, but it is a humane provision of the law, intended as far as human agencies can, to guard against the danger of an innocent person being unjustly punished.

The COURT instructs as a matter of law that the burden of proof is on the prosecution to establish by the evidence beyond a reasonable doubt, first, that the deceased came to her death by poison; second, that it was administered to her by the defendant, or that he caused it to be administered to her in her life-time; third, that the defendant administered, or caused to be administered, the poison to the deceased, willfully and knowingly and with the intention of depriving her of life; and fourth, that the deceased actually died from the effects of the poison so administered to her. These are material and essential propositions necessary to be established to warrant a conviction, and if you entertain any reasonable doubt upon either of them then the prosecution has failed to establish his case and you should acquit the defendant.

The COURT further instructs you that in considering the question whether the defendant did or did not administer or cause to be administered poison to the deceased as charged in the indictment, if you believe from the evidence beyond a reasonable doubt that defendant sent, or caused to be sent to the deceased, poison, with the intention that she should take a swallow of it, then you are authorized to find the fact that he administered such poison to the deceased.

The COURT instructs you that in this class of cases, where the indictment charges that death was caused by poisoning, it is not necessary to prove the particular substance or kind of poison used, nor is it necessary to give direct or positive proof of what is the quantity which would destroy life nor is it necessary to prove that such quantity was found in the body of the deceased. It is sufficient, if you are satisfied by the evidence beyond a reasonable doubt that the death was caused by poison of some kind, and that the poison was administered by the defendant, or that he caused it to be administered to the deceased with the intent of causing her death.

The COURT instructs you as a matter of law that in considering the case you are not to go beyond the evidence to hunt up doubts,

nor must you entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable and must arise from a candid and impartial investigation of all the evidence in the case, and unless it is the same kind of doubt which in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. You are not at liberty to disbelieve as jurors if from the evidence you believe as men. Your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered.

A reasonable doubt cannot be found upon any sensibility on the mind of any juror as to the consequence of his verdict. You should not create sources or materials for doubt by resorting to trivial or fanciful suppositions and remote conjectures as to the possible statement of fact differing from that established by the evidence. If, after considering all the evidence, you can say that you have an abiding conviction of the truth of the charge, then you are satisfied beyond a possible doubt.

The COURT instructs you that the law requiring you to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together, you are satisfied beyond a reasonable doubt that the defendant is guilty.¹

The COURT instructs you that what is meant by circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as to tend to show the guilt or innocence of the party charged, and if these facts and circumstances are sufficient to satisfy you of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize you to find the defendant guilty. In its consideration it should have its fair weight with you, and if, when it is taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, you should act on such conviction. You are not to fancy situations which do not appear in the evidence, but you are to make those just and reasonable inferences from circumstances proved which the guarded judgment of a reasonable man would ordinarily make under like circumstances. The law exacts the conviction of a person charged with having committed a crime when there is legal evidence to show his guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence.

The COURT instructs you that where a conviction for a criminal offense is sought upon circumstantial evidence alone, the People must not only show by a preponderance of the evidence that the alleged facts and circumstances are true, but they must be such

¹ This instruction the Supreme Court on appeal, held to be incorrect. 18 Colo. Reports 170.

facts and circumstances as are absolutely incompatible upon any reasonable hypothesis with the innocence of the defendant, and, when considered together incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant; and, in this case, if all of the facts and circumstances relied on by the People to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, or if such facts and circumstances do not satisfy you beyond a reasonable doubt of his guilt, then you should acquit him. But if you believe from the evidence beyond a reasonable doubt that the facts and circumstances given in evidence, and proved to your satisfaction in the manner stated in these instructions, are absolutely incompatible upon any reasonable hypothesis with the innocence of the defendant, and when considered together are incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant, then such facts and circumstances are sufficient to authorize you to find the defendant guilty.

The COURT instructs you that the burden of proving everything essential to the establishment of the charge against the defendant lies upon the prosecution, and even if it be conceded that somebody murdered the deceased, yet the defendant is not required to prove who committed the murder. The prosecution is required to prove beyond a reasonable doubt that the defendant, and not somebody else, committed the murder charged in the indictment. It is not sufficient to justify you in a verdict of guilty that the evidence discloses that the deceased was murdered, and that the defendant or somebody else murdered her, or that the probabilities are that the defendant and not somebody else murdered her. It must be shown by the prosecution beyond a reasonable doubt that the defendant is the guilty party.

The COURT instructs you that, when the verbal admission of a person charged with a crime is offered in evidence, the whole of the admission must be taken together, as well that part which makes for the accused as that which makes against him, and if part of the statement, which is in favor of the defendant, is not disposed of, then such part of the statement is entitled to as much consideration from the jury as any other part of the statement, unless inherently improbable or inconsistent with the other evidence in the case.

The COURT instructs you that, if the evidence in the case fails to show any motive on the part of the defendant to commit that charged against him, this is a circumstance in favor of his innocence, which the jury ought to consider in connection with all the other evidence in the case in arriving at a verdict.

The COURT instructs you that you are the sole judge of the credibility of the witnesses and of the weight to be given to the testimony of each witness, and in determining the weight to be given to the testimony of the witnesses you should take into consideration their means of knowledge, strength of memory and opportunities for observation, as these matters are shown by the evidence in the case, the reasonableness of the statements made by them respectively, the

consistency of their testimony, the fact, if fact it is, that they are contradicted by other witnesses, or by facts and circumstances satisfactorily proved, their bias, prejudice and interests, if any has been shown, and the other facts and circumstances established by the evidence which, in your judgment, affect the credit due to them respectively; and the COURT further instructs you that, if, after considering all the evidence in the case, you find that any witness has wilfully and corruptly testified to any fact material to the issue in this case, you have the right to entirely disregard his testimony as corroborated by other credible evidence.

The COURT instructs you as a matter of law that, when the defendant testified as a witness in this case, he became the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness, and in determining the degree of credibility that shall be accorded to his testimony, you have the right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor and conduct upon the witness stand; and you are also to take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses. And the COURT further instructs you that if, after considering all the evidence in this case, you find the witness has wilfully and corruptly testified falsely to any fact material to the issue in this case, you have the right to entirely disregard his testimony, excepting in so far as his testimony is corroborated by other credible evidence.

The COURT instructs you to reject from consideration all the testimony touching expressions made by the deceased in respect to her loss of regard for and confidence in the defendant, and in respect to her intentions as to the disposition of her property and the management of her affairs, unless it appears from the evidence that before the transmission of the bottle spoken of in the testimony the defendant had knowledge that Mrs. Barnaby had lost regard for and confidence in the defendant, and that she had intentions of changing the disposition of her property and the management of her affairs.

The COURT instructs you that in arriving at your verdict in this case you must wholly disregard anything which you may have heard before you were accepted as jurors, and you must not allow any feelings of fear or favor, or any expressions, either in favor of or against the defendant, to influence you in any degree, and your verdict must be based solely on the evidence in the case.

THE SPEECHES TO THE JURY.

MR. PENCE FOR THE STATE.

Mr. Pence. Gentlemen: The counsel for the Government are sworn officers of the law, and while such it is not their mission to convict and punish the guilty alone, but to protect the interests of the innocent. If Thomas Thatcher Graves,

with his weak, vacillating nature, did not prepare the poison which, covertly sent, accomplished the death of his benefactress and friend, who had elevated him from poverty to independence, the Government cannot expect you to find him guilty. But there seems to be no doubt of the guilt of the accused. *Mr. Pence* denounced the tramp of a doctor and adventurer of a lawyer who conspired to deprive this feeble, paralytic old lady of her estate and administer deadly poison to their victim. He dwelt with great earnestness on the manner in which Dr. Graves and Mrs. Barnaby got acquainted, as testified to by Mary Hickey, the old and confidential servant, and emphasized the fact that J. B. Barnaby knew what he was about when he made his last will and testament. He referred to the action of the two precious scoundrels who sought to rob her of the estate in securing the contest of the will by defaming the husband and questioning the legitimacy of the youngest child. There was never a happier home, a more loving father, mother and children. They were together a happy family in Florida, the Adirondacks and elsewhere, until these vultures gathered for the spoils. Where did these villainous insinuations emanate from? Where did the loving message come from to Mrs. Barnaby that her husband had left \$100,000 to a mistress? Dr. Graves. And if the senior counsel for the defense should fall back into the lap of the man who was the chief author of the outrageous scandal, is it to be wondered at that John H. Conrad said on oath that he believed Ballou to be a full-fledged conspirator and co-robber. No one believed that Ballou helped distill the deadly poison, but his handiwork has shown everywhere in this case, and in the manipulation of the old lady's estate. Col. Ballou, no, not Colonel, for the record shows him not by that title, but recognizes him by that of "Squire," it was Squire Ballou who told Mr. and Mrs. Benjamin Earle, and he dare not contradict it, in the presence of the old lady that he proposed to meet scandal for scandal. It was his friend, the Doctor, who wanted the old lady to cast doubt upon the legitimacy of her youngest daughter's birth. Great God! what a request to make of a loving mother.

Mr. Pence reviewed the testimony in the history of the proceedings by which Dr. Graves obtained absolute control of her property in life, and the settlement of her estate after death, without any security, and gave an amusing sketch of the scene between Ballou and Graves, when the former gave his co-laborer, Graves, \$500 for his services in prevailing upon Mrs. Barnaby to pay the firm of Ballou & Jackson a fee of \$10,000. He referred to the all-round drag net receipt of May 8 for \$16,000, which the Doctor obtained from Mrs. Barnaby, and said it was a prolific day for the Doctor at No. 260 Benefit Street. He asked the jury who it was that marked the line for the feeble old lady to trace her name on. He showed the jury the marked lines beneath this receipt and the other paper extending his power of attorney so as to invest the property. To give force to his argument he emphasized the point that Ballou must have suggested the second power of attorney to the Doctor, and sharply condemned the practice of the Doctor in investing bonds with his brother-in-law, who sold pins, buttons, hats and knick-knacks.

He then directed his attention to Sallie Hanley, the innocent, guileless maid, who was steered into the combination through the philanthropic agency of the Doctor. The speaker recited the events at the Adirondacks, the letter the Doctor wrote to Mrs. Barnaby of Dec. 26, complaining that there had been trouble and persuading Bennett in talking to smooth it over with Mrs. Barnaby. Miss Hanley testified that she returned to Providence on Dec. 16, 1890, with Mrs. Barnaby, which was on the very date when Dr. Graves persuaded the helpless old woman to sign the receipt of \$16,000 for money expended or advanced, for which it was not convenient to give receipts. The Doctor couldn't remember the date but the guileless maid did, and she invited the suspicion of conspiracy.

It was at this juncture that were sown the seeds of discontent and resistance which culminated in the unhappy death of the unprotected victim at the hands of these villainous cormorants.

There was nothing left for Mrs. Barnaby except the right

to live when she went to California, owing to the omnivorous grasp of her evil-wishers. If she died, there was left a sole executor without bonds. The counsel emphasized the significant difference between an executor without bonds and one held by security. There was no man or woman in the court room who would make a stranger an executor without bonds. It was the sole interest of the executor and not of the dead. No friend of the dead woman drafted any such instrument, but rather the executor. When Mrs. Barnaby left Providence, Dec. 17, 1890, she was the victim of an ill-designed and villainous conspiracy by two plunderers wearing ex-army buttons, and nothing was left to her executor but her life. He could not under the executorship of a will control her estate more absolutely than under a power of attorney, for that would expire with her death. On April 7, 1891, his check is transferred to another bank to the credit of T. Thatcher Graves. If steps had been taken for the appointment of a guardian Dr. Graves would never have turned over that \$100,000. Fortunately, Mrs. Conrad had a husband who took hold of the matter and forced it to an issue. He then referred to Mrs. Barnaby's trip to Denver and to the California trip, the claim by Dr. and Mrs. Graves that they were invited to go with Mrs. Barnaby, the threatening letter from Dr. Graves and Miss Hanley, which had aroused Mrs. Barnaby's dissatisfaction and distrust, and the fact that Mrs. Barnaby took Mrs. Worrell with her on the trip, which was known to Sallie Hanley on the date Mrs. Barnaby left. And Dr. and Mrs. Graves were not invited, and Sallie Hanley told them of the proposed trip, which she was deprived of participating in.

He emphasized the admission by Mrs. Barnaby that Dr. Graves had told her Mr. Barnaby had left \$100,000 to his mistress, which had been broached in the Adirondacks, and finally was admitted by Mrs. Barnaby that the Doctor was her informant. The second will at Chester was drawn by a decent lawyer, who did what any honest and worthy advisor should do, inserted the provision that the executor should give bonds, and reduced the amount which the testatrix had

originally devised. After executing the will Mrs. Barnaby went to her room, sighing and weeping in her mental distress that the Doctor would be the death of her yet. Dr. Graves knew Mrs. Barnaby's address in Denver by the telegram sent him by Mrs. Barnaby to send her "nerve and memory" medicine, which was shipped in January. He did not criticise the manner of the Doctor's sending checks to Mrs. Barnaby. It checked her expenditure and left more for him to lay up. One page of the letter which Mrs. Worrell addressed to the Doctor March 7th, from Arrowhead, telling him when they were to arrive in Denver, was missing, and the defense do not and cannot produce it. The receipt, which Mrs. Barnaby signed for the \$80,000 in Monterey, Cal., was unknown to her, for she told Mrs. Worrell that it was somewhere about \$10,000. The poor woman never knew what she had signed. She wanted to invest \$6000 to \$7000 in real estate in Denver, but didn't know how much cash she had. She died in a land of strangers, with her face to the mountains, and her spirit joined that of her dead husband. Mr. Pence referred to Dr. Graves' investment of the \$80,000, saying he selected his brother-in-law, a boot and shoe dealer, who developed wonderfully when a good feeder came with the family. There was no dispute that Dr. Graves received the \$80,000 on March 21, after he returned from Denver. Having acquired everything that she had in life, which would contribute to his aggrandizement and independence, the taking of her life was necessary to prevent the revocation of the powers with which she had possessed him. Coming down to the forwarding and delivery of the poison bottle, he said that the motive was to send the deadly poison in the season when tokens of love and friendship were symbolizing the Christmastide. But the jurisdiction must be transferred to a section where publicity could be avoided. Dr. Graves knew she liked a whiskey toddy, and so he prepared a compound which the most distinguished experts in the country were unfamiliar with, and which could not be purchased in a drug store or other public place. The Doctor knew her address by the January telegram asking for medicine. The Doctor said he knew it in Worrell's office, and

then tried to lay it off on the Bennetts and repeated this to the Worrells and the Conrads.

Mr. Pence placed great emphasis on the statement of *Mrs. Barnaby* in her dying hours that she didn't believe the Bennetts poisoned her, but when Dr. Graves name was mentioned as the guilty person, she turned her face to the wall, sighed, and said never a word. Her significant silence in her last moments was far more powerful and impressive than an oath on the witness stand. She died without discovering the absolute and full proportions of Dr. Graves' monstrous villainy toward her, and in her latest hour said aloud: "I wonder if Dr. Graves could have done this."

The contents of the bottle was sufficient to kill 50 persons; the devilish cunning of the scheme involved the inscription: "From friends in the woods," so as to attach the crime to the Bennetts. Dr. Graves was in Boston two or three times during the week the bottle was sent, and had some doubtful transactions with the shoe dealer and broker Royce.

"Oh, what a tangled web we weave
When first we practice to deceive."

Several witnesses had testified that the Doctor had charged the Bennetts with the crime, and the Doctor had alone denied it. He traced the dispatch of the package from Boston to Denver, arrival at the Worrells' office, and *Mrs. Barnaby's* suggestion from the inscription that it might have come from the Bennetts.

Mr. Pence then directed his remarks to consideration of the evidence for the defense. It sought to attach suspicion to *Mrs. Worrell*, and then shifted their theory at haphazard, probably through lack of information or denial of the truth by Graves. After abandoning that theory they found arsenite of potassium was in common use in livery stables, despite the expert researches of Prof. Headding, Haines and Sewell.

Turning to the deportment and suspicious actions of the Doctor in his trip from Providence to Denver, and after his arrival in Denver, *Mr. Pence* said that Graves alone was the sloth and the sluggard, while all the world was astir, and the

machinery was set in motion for the detection and conviction of the criminal. The prisoner was not tearing along at lightning speed, but was tarrying with relatives in Sterling and Cedar Rapids, waiting for fast trains and missing connections.

Passing to Dr. Graves, *Mr. Pence* spoke of the terror and trembling of a guilty soul, as emphasized in the Doctor's tardy arrival, his excitement and avoidance of seeing the remains of his dead benefactress, and his suggesting that it was the Bennetts—the same motive which prompted him to write the inscription. There was no reasonable excuse for this reflection except as a part of the play, and the defense would not assume to show that there was any suspicion attached to the Bennetts. The Doctor's actions in Denver at the Worrells' house were cited, when he became so excited that he half jumped from his seat and wanted to get outside to breathe, as he could not think. It might have been true, as the Doctor claimed, that Mrs. Barnaby had a mania for making wills; if she had not, her chief beneficiary and sole executor might have permitted her to live until today. The Doctor was willing to get away from the horror of public discovery of men on his trail, and his drink at Tortoni's, and intention to go to a ball game were simply designed to get away from his troubled conscience, and all this time his victim lay encased in a casket in the undertaker's shop, the remains cut and mutilated by the surgeon's knife in the detection of the agent that wrought her death. The Doctor knew that Mrs. Conrad had arrived, and two vigilant and determined men, J. H. Conrad and Ed. Worrell, Jr., had entered upon a thorough investigation. As to the Doctor's avoidance of Mrs. Conrad on the funeral journey, while the Doctor may have nerve, the combined nerve of a doctor and an assassin were not sufficient to meet the daughter of his murdered victim. The chief beneficiary deserted the remains at Jersey City.

The Doctor did not attend the funeral to take a last look at the dead face of his dear friend, and to place a wreath of flowers on her casket. No! for the first time the electric bells did not ring that day. He rushed to the front and side doors,

stopped but an instant, and then crept away stealthily by a back way to his office. The Doctor was aware that Conrad was coming, and he had no helpless, paralytic woman and two stricken daughters to deal with, but a full-fledged, determined man. The Doctor decided to make an attempt to smooth things over. The statement of the Doctor that Conrad would give \$25,000 to any one who would sign a statement that he sent the bottle of whiskey in order to help Conrad achieve his political ambition, was as flimsy and indefensible a statement as was ever conceived. It was singular that Conrad could get no takers at that price in Providence. The Doctor had failed to refute the statements of Conrad and Hanscom, and his own statement was contradictory in cross-examination to his direct. The jury would be talked to about a Scriptural quotation as to mercy, but the jury should be governed by the remembrance of the quality of mercy which was exercised by the murderer in first robbing and then poisoning his victim. In such measure as he faltered or hesitated in the inception and consummation of his crime, so might his counsel seek to influence the jury to falter or hesitate in forming the verdict. He directed the attention of the jury to the appeal to their sympathy by the introduction of the Doctor's aged mother and estimable wife in his defense, but to be mindful of their oaths to weigh the evidence, independent of any domestic influence, and to gauge the testimony fairly and impartially upon its merits, and determine their verdict by the index finger of justice to the People and defendant.

MR. BALLOU FOR THE PRISONER.

Mr. Ballou stated to the jury that under the indictment they were to find whether Dr. Graves was guilty of the crime as charged or not. At the opening of the argument today he was in doubt whether it was not attempted to associate some other person with the crime. He criticised the action of the attorney in apparently setting out to discuss a crime for petty larceny rather than for the commission of a crime which in-

volves life. He said that while a stranger, yet the faces of the jurymen had been photographed upon his memory and would remain with him until his death. His reputation, life and antecedents were a sealed book to the jury, but he was assured from looking into their faces that though a stranger, he would meet with friendly and considerate treatment at their hands. He referred to the duties of the Government as well as the defense to bring the truth to the jury, and the defense had no doubt of the innocence of the defendant, and that the verdict should be "Thatcher Graves, you are a free man with faith in freedom of God's light vindicated." This was the first time that he had ever been called upon to defend a man charged with crime, the penalty of which was capital punishment, and he recognized the tremendous responsibility devolving upon him. He described his boyhood days with Tom Graves in the Academy at East Thompson, Windham County, Conn., and said he little thought he would ever be called upon to defend the life of his old schoolmate in a court of justice. He expressed confidence in the fair-mindedness of the jury, that it would not be governed by insinuations or reflections upon himself to prejudice the interests of his client. He believed they would be influenced by judgment and reason rather than by prejudice and misrepresentations. His own preference would have been to keep silent, but his colleagues insisted that he should bear his share in the heat and burden of the day, and having never shirked his duty, he had determined, although a witness for the defense, to discharge his duty as attorney for the accused. He would be a coward did he hesitate in a case of such tremendous gravity, to take the responsibility. He asked the jury to give him respectful and courteous attention while he reviewed the evidence in the case.

He urged the jury to remember the deportment of the witnesses with clearness and fidelity, and to be governed by facial expressions and manner, and weigh the testimony carefully. He asked the jury whether they had observed any subtle influences of hatred, revenge and dislike on the witnesses on

the stand. If they had, he urged them not to be governed by it in the slightest. A human life was at stake, and its significance should impress itself upon the jury. There was a time when human life counted as nothing, but the progress of civilization had wrought a wonderful change. He dwelt at some length upon the value of the sacredness of human life, attention to which might have been diverted by the pleasantries and witticisms of the counsel and emphasized the feeling of prejudice which the pulpit, the platform and press may have created against T. Thatcher Graves, whereby a fair trial might possibly be denied him. He urged the jury not to be influenced by such pressure, and he believed that they were independent of such agencies. He then discussed the question of circumstantial evidence, upon which the guilt or innocence of his client was solely based. Statutory inhibitions compelled them to watch with the utmost care and diligence in the introduction of such evidence. He also discussed the right of trial by jury in the advancement of civilization as contrasted with the Mosaic law governing circumstantial evidence, and cautioned the jury to guard against precipitation of judgment induced by mental emotion. He urged upon the jury the importance of not being influenced by inflammatory utterances from the platform or by the press calculated to create passion and prejudice. These were improper sources, and he believed that the jury had disabused their minds of any unholy influences brought to bear upon them by man or devil.

He took occasion to eulogize the State of Colorado, its resources and its character, enterprise and integrity of its people, and then passed to the consideration of the motive of the crime. Dr. Graves was agent for the deceased, but there is no evidence that his services were foisted upon her except by inference or probability. Mrs. Barnaby was incapable of conducting the agency and management of her affairs, and the legal interpretation of the contract is that Dr. Graves had full power to invest her property in bonds and securities which would inure to her best advantage rather than to his.

Hence he could not conceive any motive to govern him in his alleged purpose to destroy her life. It was not his purpose to take up any question in which he, as counsel or witness, had been involved in the course of the Government testimony. That would be left to the jury and associate counsel for the defense.

As to Mrs. Barnaby's visit to Providence in December, 1890, she did not go to the Barnaby mansion nor to Mrs. Hickey, but to the house of Dr. Graves, where the former's receipt was drawn, signed and executed. Dr. Graves was not the sole witness of the proceeding, but the venerable and respected mother of the accused, who could not lie with her feet in the confines of the life beyond. Her testimony, that Mrs. Barnaby invited her son and wife to California was vital and significant as indicating the kindly and confident prompting of Mrs. Barnaby's heart. It would transcend the imagination of poetry or prose to discover any motive for the crime. As to the Chester will, if there was an evidence of dissatisfaction, why did the Government not summon Attorney Rose, who drew the will. He would not discuss the experiences in the Adirondacks nor the reception of the guardianship letter. That was left to his associate counsel, but directed attention to the contents of the two wills, from which he would evolve two salient points. He sought to impress the jury with the solemnity of the writing and the detail of the last will and testament, and compared with general collection of dates, bequests and contemporaneous circumstances. In the first will Mrs. Barnaby disposed of legacies in the sum of \$79,500. In the second will, drawn and executed by Attorney Rose, Dr. Graves had been bequeathed \$25,000, the same sum as in the original will, although the Government had sought to prove by the Bennetts and the Worrells that Mrs. Barnaby said she gave the Doctor \$50,000 in the first will, and intended to reduce it. The jury was asked to weigh the question carefully as to whether Mrs. Barnaby was of sound mind. As to the Chester will and its changes, the counsel emphasized the statement that the Wor-

rells poisoned Mrs. Barnaby's mind, rather than Dr. Graves. The Worrell's lawyer drew the instrument after the party had been dismissed, and at 2 o'clock in the morning. Attorney Rose could not have framed the will without Mrs. Barnaby's assent, having knowledge of the first will, and that the legacy to the Bennetts and the increase of other bequests, was obtained by reduction of the original bequest to the Barnaby grandchildren. There were secrets enclosed in these wills. J. B. Barnaby, a millionaire, left his wife, who had been accustomed to wealth and luxury, the paltry annuity of \$2500. That is sufficient and needs no further explanation. He emphasized the accustomed shrewdness of Mrs. Barnaby at the time she executed the receipt in California for the sum of \$80,000 which had been paid over by the trustees to Dr. Graves. She told Mrs. Worrell that it was only a receipt for \$10,000, for she did not wish to take her fully into her confidence. Hence, Mrs. Worrell came to Denver from California, first, probably as a result of a little tiff, and when Mrs. Barnaby came she went to John Schermerhorn's instead of young Worrell's. Straws sometimes tell which way the wind blows, and they may be made serviceable in this case. It was not for the defense, believing that Dr. Graves was innocent, to declare who is the guilty party. That is for the Government to ascertain. There certainly has not been any evidence adduced of any dissatisfaction by Mrs. Barnaby with Dr. Graves, or any tenable motive to induce him to the commission of the crime.

Passing over the alleged confession of Dr. Graves to John and Charles Conrad, which would be discussed by his associate counsel, he took up the evidence of guilty knowledge on the part of the accused. Reference was made to his indignant departure from the Barnaby house that Thursday night and the concurrent testimony of his mother of his feelings when he reached home. He leaves his own relatives, not waiting to arrange his business and his private papers, and proceeds to Denver. At Chicago he learns from the papers that he is likely to be convicted on his arrival in Denver. He telegraphs

to counsel, and when he arrives consults with Judge Furman, who advises him not to appear before the grand jury. This certainly did not manifest any guilty knowledge of the crime, or else he would not have gone directly to the city where the crime is alleged to have been committed.

Mr. Ballou then reviewed the circumstances of the Doctor's trip to Denver after notification of Mrs. Barnaby's death, alluding to the stops at Sterling and Cedar Rapids as something which could be ascribed to his attack of grip and his desire to see his relatives. If the Doctor was guilty why didn't he arrange to reach Denver as soon as possible, before the discovery was made, and ship the body to Providence, or else remain in Providence and not take any means to go to Denver and bring himself within the jurisdiction of the State. It was contrary to any rational judgment that a man of Dr. Graves' skill should have compounded such a bungling mixture as this, and governed by greed, malice or passion run the risk of destroying many lives. There was no passion, hate and revenge, so far as the accused was concerned, and if these elements are lacking the criminal operates with calm judgment and deliberation. The reason Dr. Graves did not look into the eyes of Mrs. Worrell, Sr., in the Worrell house when appraised of Mrs. Barnaby's death, was because the younger Mrs. Worrell was present and was far more attractive. He attacked the newspaper fraternity, declaring that they invaded the privacy of homes in their ambition and rivalry to pander to the sensational tastes of the public. He charged the jury to weigh carefully such evidence as had been submitted by the newspaper reporters. He then passed to the consideration of the arrival of the package in the Worrell office, and claimed that if the bottle contained whiskey Mrs. Barnaby, who drank sparingly of liquor, would have detected it. There was no proof in any event. The integrity of the bottle was lost by its remaining in the Empire stable 24 hours and aside from the evidence submitted in the case, the doubt must be raised as to the integrity of the bottle, or the decisive question was wholly lost by its first, to its second arrival at the Worrell house.

He criticised the expert testimony on the chemical analysis by Prof. Haines, which was valuable in a technical sense, but juries are not to be absolutely bound by experts' conclusions. Referring to the cause of Mrs. Barnaby's death, he emphasized the discrepancy between the certificate of the attending physician of congestion of the lungs, and the testimony of the expert that she died from arsenical poisoning. No inquest was held, and hence, no official inquiry was held, probably because the Coroner was not officially notified by the attending physician that death resulted from arsenical poisoning. He then went into an elaborate analysis of the expert testimony resulting from the autopsy, and in closing said that his counsel felt with Dr. Graves that his deliverance was assured.

MR. MACON FOR THE PRISONER.

Mr. Macon, (who by instruction of his physician, was allowed to sit during the delivery of his address,) said that he had come at great personal risk to defend a client, a duty which he must perform no matter if it should cause his death, for it would be a satisfaction of duty well performed. He impressed the jury with the Scriptural injunction of charitableness in hesitating to condemn a person for error or crime; while he had often prosecuted criminals in his long service at the bar, yet it was his duty to see that conviction or release was not obtainable by illegal means. Referring to the dark ages when life was mercilessly sacrificed, he said that civilization had advanced to such a degree that it was generally recognized that it were better that ninety-nine guilty persons should escape than that an innocent man should be punished. He did not believe that the jury had any desire to wrong the accused in transgression of the law and their oaths.

He alluded to the terrible attacks of the local press upon the accused, which had influenced the opinions of scores of talesmen and unfitted them for service. This jury had declared under oath that they had not been so influenced, and hence he had reason to expect a fair and impartial consideration of the law and evidence. The District Attorney had sup-

pressed evidence calculated to aid the defense. The Court would, if it was called to his attention, pass upon the action as an illegal means to secure conviction.

As to the instructions of the Court as to circumstantial evidence the jury must analyze the fact or circumstance until they have arrived at a conclusion beyond a doubt, and absolutely consistent with the guilt of the defendant.

The jury was absolutely dependent upon the statement of law from the Court. If it was mistaken in any point whereby injury to the defendant is brought about the verdict can be set aside by appeal to the higher court. Law was a science, not a system of jugglery, whereby the smartest and most capable scoundrel can avoid the ultimate penalty for its violations, for the percentage of humanity was not criminal, else there would be no advancement in civilization, intellectuality and morals.

In reviewing the evidence for the prosecution, in all his experience he had never seen such willful and malicious misrepresentations and distortion of facts. As to Mary Hickey he said that the prosecution had drilled her perfectly and she spoke her piece well until the cross-examination. Her testimony was infamous, and while the Government had charged that the defense were losing or concealing letters, he demanded of the Government why they had not produced the letter of Mrs. Barnaby to Mrs. Hickey to watch Dr. Graves. The witness said she had burned it, when one would naturally suppose as an old and confidential servant she would have treasured the letter as an heirloom and legacy to her children.

The argument of the Government's counsel was an attack upon the character and integrity of the witnesses for the defense, which he believed the jury were convinced were equally as creditable and respectable as those introduced by the Government. And they claim that they have contradicted the witnesses for the defense. How does that avail as against the contradiction of their own witnesses by the witnesses themselves?

Mr. Macon then defended the character of his associate. He said that while he had not a drop of Puritan blood in his veins, at the same time he had visited Rhode Island years ago

and remembered the proverbial hospitality of the State. Family pride was also a distinctive characteristic, and he did not believe that a man like Col. Ballou could maintain his prominence there and be worthy of such an attack as he received yesterday. The New England people had as high a sense of honor as those of Charleston, Richmond or Savannah. He denounced the Pinkertons as similar to a pack of Hessians in the Revolutionary War, who would kill any person for hire. He said that he had learned to respect and appreciate Col. Ballou from an intimate association with him for the past six weeks. He said he was an honorable, high-minded, intelligent and conscientious gentleman and lawyer, was an honor to his profession, and was proof against such malicious and unwarranted attacks, which were not based upon any evidence in the case.

Regarding the payment of the \$10,000 to Ballou & Jackson by Mrs. Barnaby as a fee, the practice of lawyers was to charge in proportion to the amount secured rather than for the time employed, and that was not an exorbitant fee. I will show you, gentlemen, if I have strength left me before I close, the true inwardness of this villainous conspiracy whereby an innocent man is to be murdered in order that the wills may be destroyed and the property, valued at \$150,000, may fall into the laps of the Conrad family and Miss Maud Barnaby, and as to whether this princely waiving of such a substantial sum is genuine or manufactured. To charge a man with criminality because he displayed a spirit of gratitude shows the desperate straits to which the Government is brought. The happy and affectionate Barnaby family was evidenced by the bequest of \$2500 to Mrs. Barnaby by her husband, and the fact that during the winter of her widowhood and grief she did not stay with her affectionate and dutiful son-in-law, but went to Saratoga, California and elsewhere. If she was paralytic, helpless, infirm and weak-minded, why did not the dutiful son-in-law and daughter ascertain the name of her physician, or make some effort to make her life peaceful, happy and contented.

The strained relations between mother and daughters was

evidenced by their separation and non-communication for four years. How deep this alienation must have been when the mother and daughter could not lay it aside over the bier of the father.

Mr. Macon attacked the prosecuting attorney for his misquotation of testimony in order to secure the conviction of the accused. He who convicts a man for a capital offense by perjury is under the law a murderer. The opening statements by the attorney for the Government were the most outrageous, the most vindictive, and the most inexcusable statements that he had ever heard in a court of justice. The jury is not to be influenced by the distorted statements of the State's attorney. If *Dr. Graves* did lie he was protecting his life, while the State's attorney, for the sake of a small fee, deliberately falsified the evidence in order to influence the conviction of the accused. The Government could not draw strength and support from the weakness of the case for the defense. The jury might draw the inference from the fact that *Mrs. Barnaby*, helpless, paralytic, and mentally weak, was turned out of doors with a paltry annuity of \$2500, while an estate valued at \$1,750,000 was left by her husband. Under these circumstances was it not natural that when *Mrs. Barnaby* went to consult her friend he should tell her that she must fight for her rights, and suggest to her to consult counsel? She secured *Col. Ballou*, and yet they called him an adventurer, conspirator and co-robber. The reason for *Col. Ballou's* not answering *Mrs. Barnaby's* letter from the Adirondacks, asking for protection from *Dr. Graves*, was that it was toward the close of the season and he should soon see her and talk the matter over—a precaution which is often taken by lawyers. As to the purchase of the cottage in the Adirondacks, how could she have purchased a \$4000 cottage on an income of \$2500 per year, with only moderate rents, and taxes, etc. No wonder that *Dr. Graves* cautioned her against extravagance. As to the threatening letter sent by the Doctor to *Mrs. Barnaby*, it was in evidence that the Doctor had personally cautioned her to practice economy, and admitting that it was of a threatening character there was no connecting link calculated to war-

rant the statement that it was consistent with the Doctor's guilt. The assassin theory of the Government is not tenable, as contrasted with the theory of friendship and precaution. The Sallie Hanley letter was written for the protection of Mrs. Barnaby from the influence of Bennett, who wanted her to buy a house which he lived in and wanted to dispose of at an exorbitant figure. Miss Hanley was a poor working girl. Denver had institutions and asylums for the protection of just such girls, and the citizens think of such security and protection with honest pride. Had the defense been given the opportunity to prove characters, the hell-hounds of the Pinkertons would have sought to defame her character and swear her out of court. They have shadowed her constantly since her arrival here, eager to blast her name and drive her out of the town, but no evidence is given against her by the Government witnesses. The detective force has permeated Denver until the system has become rotten, but with this agency and a million dollars behind the Government they have not been able to attack her purity, fidelity and integrity. The jury had been told that sympathy did not enter into their consideration of the verdict. Sympathy quickens, sharpens and stimulates the faculties, and the parable of the widow's son in Holy Writ is evidence that sympathy was Christlike and divine. As in the Scriptural illustrations, sympathy and justice would go hand in hand, and from the bier in which the Government would seek to bury the accused the jury could by their verdict bid him to rise and be restored to his mother.

As a refutation of the accusation that the Doctor conspired to rob Mrs. Barnaby, the fact was in evidence that as soon as he got the \$80,000 he invested it in bonds and securities of no value to himself. If he desired to rob and murder, he could have sent his messenger of death, drawn the money or obtained a check on a Canadian bank, and in 10 hours he could have been free from arrest and prosecution. These investments are an emphatic contradiction of the theory of guilt.

Mr. Macon called attention to the reception of the package postmarked from Boston containing the bottle of poison in

Worrell's office. He said that in evidence it was testified by the Government that the bottle, from the time of its shipment to the arrival in the office, had been corked 17 days. And yet Mr. Schermerhorn took the stopper out of the bottle with his fingers, notwithstanding the saturation to which it must have been subjected and which would naturally have swelled it. Also the fact, as shown by evidence, was that the original wrapper around the package had been destroyed, and another substituted, when E. S. Worrell, Jr., took it to his house. If that original wrapper had been preserved it might have given a clue to the identity of the sender, and the directions might have been compared with that on the bottle. Might it not be possible that the medicine sent for came about the same time, and that an exchange of wrappers might have been effected in the Worrell office? He did not desire to deal in suspicions other than his belief, that if the Worrells were associated in the crime, if suspicions counted in the case, they could be more directly attached to the Worrells than to Dr. Graves. The liquid did not have the color, taste, nor smell of whiskey, and yet this woman, who tasted the liquid at times, was to be trapped to her death by such a mixture as this, said to have been prepared by a skilled physician. The paralytic old woman, Mrs. Barnaby, went down stairs in her feeble condition while Mrs. Worrell, hale and hearty, remained in bed. Mrs. Worrell sipped the liquid, while Mrs. Barnaby swallowed hers at a draught. It tasted like soap to the counsel, and nothing worse. If he was so fortunate as to get to heaven and learn there that Mrs. Barnaby drank that mixture and died, he would believe it. But never in this world would he believe that Mrs. Barnaby ever drank that stuff and died. It did not stand to reason that Mrs. Barnaby in pouring the liquor into the glass, did not smell it, particularly as she went to get water in two glasses and knew the strength of the liquid from frequent use.

Remember Mrs. Barnaby's death, and the presence of the Worrells and Carriers in the side chamber during her illness. Mrs. Allen was whispering in the sick woman's ear, and gave her the idea that Dr. Graves sent the bottle. Mrs. Barnaby

said it was not the Bennetts, and when asked if Dr. Graves could be the person who sought to kill her, she turned her face to the wall and seemed to reflect. The Worrells and the Carriers then cried out with one accord against Dr. Graves, toward whom no suspicion had been directed. Suppose he was prosecuting the Worrells, would not this point of their suspicion against the Doctor be the same as the ground now taken by the Government to direct suspicion against Dr. Graves, who suspected the Bennetts? The last letter, typewritten, by Mrs. Barnaby in California, proved that Mrs. Barnaby was not dissatisfied with the Doctor. It was to the interest of the Worrells, against whom there were incriminating reports for a time, and in whose house Mrs. Barnaby died, to shift the responsibility, as well as Dr. Graves, although in not such a vital degree. The question of motive was wanting, except in the volunteer testimony of attorney Pence in his argument that the Doctor knew the contents of the will. Dr. Graves did not know and courtesy dictated to him not to ask. As to the statement that Dr. Graves was executor without bonds and could not be held personally responsible for the moneys and securities, a court could compel executors and trustees to come into court and make an accounting of their stewardship. The legatees had a remedy in the courts if they were dissatisfied with the prisoner. The death of the principal annulled his power of attorney and deprived him of his salary, and hence no motive could be assigned for the crime. The Government had shifted its case back to the will again, but if the Doctor had wanted to take the money of the estate he would have resorted to some more intelligent plan. The fact that letters beneficial to the Doctor have been lost is evidence of his honesty. If the Doctor wanted the money he would not have invested in worthless securities, as claimed by the State. The statement by Mrs. Worrell that Mrs. Barnaby said in her house in Chester that Dr. Graves would be the ruin of her yet, was antagonized by the fact that a week later Mrs. Barnaby gave Dr. Graves the same bequest of \$25,000 in her second will. The letter which Mrs. Barnaby dictated to E. S. Worrell, Jr., on her sick bed bears a friendly tone towards the

Doctor. On the other hand, Conrad had a double motive in expending so much money in prosecuting the accused. He is the sort of a man who will follow the person for revenge. Whether Dr. Graves was convicted or acquitted, Conrad would contest the Chester will, in order to benefit his children, who receive a larger legacy in the first instrument. As to the interviews in the Barnaby mansion, although Conrad had called into service Mr. Hanscom, one of Pinkerton's best men, yet when Conrad said the confession was made to him, he had ordered the experienced detective of crime out of the room.

In closing, *Mr. Macon*, after thanking the jury, again alluded to his feeble health, which might succumb to the strain to which he had subjected himself, but he had determined to perform his duty at all hazards.

MR. BELFORD FOR THE STATE.

Mr. Belford. May it please your Honor and gentlemen of the jury, before I proceed to discuss the issues upon which you are to decide this case, I desire to congratulate you, the Court and my associates on the happy resurrection of Judge Macon. The spectacle he presented this morning reminded me of the scene that took place under the dome of St. Peter's two or three centuries ago. Cardinals, in their scarlet robes, had assembled there to elect a Pontiff, who was to be the head of the Church, and they were followed by one Cardinal, sick, or apparently so, yet rearing so far above the others in ability as to find his way into the conclave. His brothers strengthened him with wine and Italian beef tea, and the other Cardinals, looking at his frame and his dramatic personage and hearing his Richelieu cough, placed the tiara on his head and the power of the Church of the Christian world, and when the ballots were counted and the smoke ascended, which announced to Rome that a Pope had been elected, the feeble man raised himself to the height of his stature, extended his lungs to their full capacity, and exclaimed: "I am Pope of Rome!" And he was, gentlemen, and history has immortalized him as Gregory the Great. He was willing to die for the cause he loved,

but he didn't, any more than my friend Macon is going to die, after having played the role of sick Cardinal and showing himself a giant in this case.

For more than a month we have been in the practical presence of a fiendish murder that has sent a thrill of dismay throughout the whole fabric of society—a crime so great, so horrible, it has imposed new conditions on the interchange of friends; a crime so artfully contrived, so artfully executed as to force people to apprehend the occurrence of a period the world had thought forgotten, when the criminal imparted poison to his victim by the waving of a handkerchief, the fragrance of a rose, the kiss from the lips. The man who sent that bottle through the mails divorced himself from human society. He must have said: "Mischief, thou art afloat; do what you will."

This is not a question of Mrs. Barnaby—not a question alone of Dr. Graves. There is a deeper, more vital subject in which we are interested. It is to rebuke the cunning, craft and subtlety that would destroy our homes. The great question above Mrs. Barnaby, above Dr. Graves, is the vindication of the wrong that threatens your life and mine. Thank God! that John H. Conrad came to the relief of this people of Colorado to assist us in vindicating the laws of this State, which had been so ruthlessly and villainously violated and outraged, and to rebuke the cunning, craft and subtlety which selected this field where he thought to receive immunity in the perpetration of a crime which has shocked the civilized world. The defense had claimed that Dr. Graves could not have committed the crime, for he could have escaped to Canada. But international law covers fugitives from justice, and he could not find there a safe refuge, but there was one spot where he could have betaken himself, the island of Cuba, the climate of which he had been diligently studying for the benefit of himself and friend.

I propose to discuss the facts of the case. I do not propose to go outside of the facts. If you cannot convict him on the facts, it is your duty to acquit him.

What is circumstantial evidence? The earth is covered

with newly fallen snow. There is a footprint there. You examine it. The pointing of the toe indicates the man who owned the shoe was going in a certain direction. You see circular prints in the snow. You see that the traveler had a cane. You follow the footprints and the cane. A man is found murdered, and the cane is there covered with blood. You learn that on a certain day that John Jones was seen going that way with a bludgeon in his hand, and find that the relations between John Jones and the deceased were not friendly. You have no hesitation in saying John Jones committed the murder.

Here is another. I shoot a pistol. A man falls dead. You don't see the ball leave the pistol and enter the man. But you draw one fact from another. You conclude I killed the man. That's circumstantial evidence.

If you disregard circumstantial evidence every pickpocket in the country could challenge convictions.

Crime works in the dark. The man who is going to steal does not call you with him. Yet if you always have to have an eye witness, nobody would be convicted of crime. So you should understand that circumstantial evidence is entitled to as much credit as direct evidence, and I defy the lawyer to mark out the line that distinguishes the evidence.

But we are told, and you will be told tomorrow, if I don't miss Mr. Furman, there is great danger in convicting a man on circumstantial evidence. Isn't there great danger in convicting him on any evidence? Isn't it as easy for a person to lie as for a circumstance to lie? Horrible mistakes will be pointed out. But these horrible mistakes were made when the defendant was not allowed counsel and could not testify. But times have changed. The State is forced to make an apology for vindicating the laws that protect our homes. If a lawyer is appointed to aid in the execution of the laws, what is the cry of defendant? Oh, it's a great outrage. But the criminal can employ the most cunning advocate, the shrewdest lawyers in the land, and stand up and belittle the man who has the courage to assist in enforcing the laws.

My theory is that the State—the people—should be as fully

represented as the defense, and has a right to call on the ablest lawyer to aid in the execution of the law. Though I am not one of the ablest, I would like to demonstrate to you, as clearly as I see it, that Dr. Graves did maliciously and villainously murder Mrs. Josephine A. Barnaby.

On the 19th day of September, 1889, J. B. Barnaby, an old and respected citizen of Rhode Island, died, leaving behind him a will, which had been prepared a year or more before. I ask your closest attention to the facts I now point out. On the 24th day of September that will was presented to the Municipal Court at Providence for probate. It was approved. A contest was commenced. On the 12th of November a contract was entered into between the trustees or executor under the will and Mrs. Josephine A. Barnaby. On the 21st of December the Court entered the decree reforming the will and declaring that instead of the \$2500 a year, Mrs. Barnaby should have the \$105,000. There was another will made, and made by Josephine A. Barnaby, wherein she granted to Dr. Thomas Thatcher Graves the sum of \$25,000. Made him sole executor, without bond, handing over to his gentle keeping her whole estate.

When was it made? The 4th of December. Over two weeks before the Court had reformed the will. The vultures of prey had made arrangements for dividing the estate before the Court decided there should be a division at all.

Who drew up the will whereby T. Thatcher Graves received \$25,000? Mr. Ballou. Who certified to the will? Mr. Daniel Ballou, all on the 4th day of December, 1889, and on the same day Daniel Ballou drew up for his dear beloved friend a power of attorney whereby Dr. Graves was authorized to draw all rents of Mrs. Barnaby's estate from her father and mother. Dr. Graves, legatee for \$25,000, custodian of will, with power of attorney, all before Dec. 24, 1889. He had not entered upon this scheme for robbery and plunder without covering his tracks. Not content with this, he slipped into another room and got up this daisy instrument which even Ballou's stomach couldn't stand. Out of this little transaction Graves was to get \$25,000 and Ballou \$10,000,

a snug sum. From that time he banished her from Providence, never to return till she came back in the spring of 1890, when he took Mrs. Barnaby from a bed of sickness to introduce her to Sally Hanley, that pliant, jaunty, slippery, serpentine piece of Rhode Island bric-a-brac.

Two years before this a bird of passage started from the New England hill. It flew to Lynn, and stopped a while in Danielsonville to preen its wings for its flight to Providence. When he reached Providence he started a patent medicine racket and sent circulars around. There is no evidence that he was ever the physician of the Barnaby family, nor that he ever stepped into the house at all. He said that Mrs. Barnaby's ailment was his specialty, and all quacks have specialties. According to the letters of Dr. Graves to Mrs. Barnaby there was plenty of bad weather there when she wanted to return from the West. It was either in Siberia or Tartary, according to the season, but in summer it was out of sight. Mrs. Hickey became the guardian and companion of Mrs. Barnaby by the legacy of that lady's parents. It was a fair presumption that Dr. Graves, knowing that Mrs. Hickey was a trusted friend of Mrs. Barnaby, invited her down to his office that he might make her the medium of acquaintances. The day after her husband was buried, Mrs. Barnaby visited Mrs. Hickey, and when she returned from the Adirondacks and was taken sick Mrs. Hickey nursed her. On the first visit Mrs. Barnaby told Mary she was going to contest the will; she told Mary she got \$2500 per year, \$30,000 inherited from her mother, and \$4000 in the bank, which Dr. Graves succeeded in getting into his voracious, consuming and everlastingly distending maw. Mrs. Barnaby said Dr. Graves urged her to contest the will, and told her her husband had left \$100,000 to his mistress, and coupled with this was the attempt to make her sign a paper that Maud was not the child of J. B. Barnaby. The infamous attempt was made on account of the fact that she was Mr. Barnaby's supreme favorite, and if such an accusation could be made it would cause suspicion to be cast upon the integrity of the will, whereby the Doctor could enter into the contest for gain. Now if Mrs. Hickey

had committed this story to memory, as the defense claims, how is it that Mr. and Mrs. Worrell know the same story? In the conversation between Mrs. Barnaby and Mrs. Hickey, the former said she would have revenge, while the latter advised her to consult her friends. This was on Sunday, and on Monday Graves called and wanted to see Mrs. Barnaby before she saw the lawyers. The reason he wanted to anticipate her visit to the lawyers was because he knew that she was thinking of engaging attorney Colwell, whose son had a great admiration for Miss Maud, so he poisoned her feelings against Colwell that he might bring Ballou and Mrs. Barnaby together in his house. A few days later they filled her mind with poison and she was led into falling into the out-reaching arms of the member of the combination, Dan Ballou. The testimony in this case as bearing upon these facts is indisputable, and no criminal can expect release at the sacrifice of human society if found guilty under such a mass of corroborated and undisputed evidence. Col. Ballou testified that he devoted more time to the preparation of this will than he had ever before. Why was it necessary to take so much consideration. It could not have been in haggling over the bestowal of \$25,000 on Dr. Graves. Based upon his personal experience as a lawyer for 25 years, he desired to make the personal statement that any lawyer who allowed that woman to will to a vendor of patent medicines and medicinal tramp, without consideration, the sum of \$25,000, and made him executor, ought to be debarred for professional misconduct.

Mr. Belford then proceeded to unfold the conspiracy to keep Mrs. Barnaby away from Providence. Graves having secured the will and power of attorney, she goes to Saratoga, and there learns from Dr. Graves on Dec. 22, 1889, that everything has been adjusted. Then he suggests Florida and Cuba, but she did not go to the latter place. In Florida, when she thought of coming to Providence, he wrote her there was hail, rain, snow and slush. In fact, read and judge from the letter, the weather was so bad in Providence that the Doctor could not keep well. This was March 17. The next letter, dated April 3, directed attention to the wind, dust and chill,

when a solitary blue bird needed an ulster to keep warm. If that solitary blue bird perched on a twig with folded wings went to sleep under God's watchful care, needed an ulster, was it such a sin that Mrs. Barnaby should send for her furs in California? In another letter he advised Mrs. Barnaby to stay in New York on her way to Providence. Contrast the payments which Graves received from the executors at intervals, and the small sums which the Doctor magnanimously sent to her. This, too, to a woman who had been reared in the lap of wealth and luxury, who had property in her own right of \$100,000, besides bank deposits, rents, etc. And to the Doctor's method of sending her money by check, when a letter of credit was the easiest and most convenient form in which she could carry and draw such means as she desired. Mrs. Barnaby could not pay her board bill until the Doctor sent the money, and in another letter the Doctor wrote out a form of check, and desired the signatures which she must attach. If she couldn't do it, Miss Hanley would show her how to do it.

In addition, when Mrs. Barnaby was left at the Adirondacks, Graves had subjugated her to his purpose by control of the estate, and the check of \$50 was sent to her with instructions how to sign it. This agent had maneuvered and planned and twisted himself into her confidence until she was not permitted in her helplessness and dependence to pay her own bills by drawing checks or to use her own money, and had fastened a female spy upon her more cunning, subtle and insinuating than any male detective. Graves' conduct all this time had been sinuous, serpentine and oblique. He didn't want to burden Mrs. Barnaby with receipts, and yet he sent a registered letter with the check of \$50 which she had to receipt for.

He sent instructions that the board bills must be sent to him, and with all the other machinations and enmity he had resorted to he denies her the poor privilege of paying her board bill. This mendicant and traveling pauper has husbanded all the resources so as to complete the robbery by her murder in a distant State where he should

receive the justly merited condemnation for his villainous conduct and atrocious infamy. Whether that man is guilty of this murder or not, his conduct in this transaction stamps him a scoundrel of the first water. Whether he ascends the gallows or walks a free man from this court room he has involved himself in a net of infamy which will warn all future widows to avoid his medicines and craft. Five days after the threatening letter on Oct. 12, he wrote a letter to Mrs. Barnaby in regard to Mr. Bennett and his actions, and that the Doctor had spoken to the executors. As to the banishment of Mrs. Barnaby from Providence and the conspiracy to prevent her return—she only returned twice—once to be introduced to Sallie Hanley, and the other time to sign the \$16,000 receipt, the object was to prevent her coming in contact with any of her people until after she had placed herself completely in his power. She was to itinerate, and she drifted to and fro like a ship dependent upon the ebb and flow of the ocean until she was ushered into that windowless palace which God has established as a haven for the respite of souls burdened with sorrows.

Mrs. Barnaby went to Chester at the suggestion of Dr. Graves. She went there and spent Christmas in 1890, it being understood that Mrs. Worrell should consent to go to California with her. They had been friends for many years. It was not by intrigue or carefully devised plot that they met in Scotland. This friendship was constantly continuous up to the time that this letter of Dec. 6 was written. The second will was made at Chester, and because Mr. Worrell was to have the interest on \$10,000 in trust for his children, it had been thrown out by the defense that they must have committed the crime, having such an overmastering hold as legatees under the will of such a tempting sum. If the \$10,000 was a little motive the \$25,000 legacy and absolute control of the estate was an absolute and overwhelming motive and could not be overcome or controlled.

As to the claim of the defense that Mr. Barnaby in

leaving her only \$2500 per annum showed that there were strained relations, he knew his wife's disposition and unfamiliarity with business affairs. He might have been suspicious that she would fall into the hands of designing men, who were plotting even then, before the death damp had disappeared from his forehead, to get \$35,000 between them, \$25,000 for Graves and \$10,000 for Mr. Ballou.

Col. Ballou said that it was a suspicious circumstance that Mrs. Barnaby, when she came to Denver to attend the Worrell nuptials, stopped at the Schermerhorns' instead of at the Worrells'. How could Mrs. Barnaby have known that a young couple to be married had a home? Mrs. Barnaby received the messenger of death in the Worrells' household and died there and was sent from there in her casket to her Eastern home.

As to the argument of Col. Ballou, it showed to what narrow straits the defense was driven in the resort to such petty subterfuge. The first half of his speech was devoted to a petition for mercy, and about two-thirds of it that the consensus of opinion of the States in the Union was adverse to capital punishment. It was a plea of confession and that Dr. Graves was guilty, but the civilization of the age declared that capital punishment should be no longer inflicted.

Mr. Belford spoke of the arrival of the package in Denver and directed special attention to the fact that Mr. Schermerhorn, and not the Worrells, first directed attention to its arrival, cut the package, preserved the stamps and aided in the investigation which led to the arrest and indictment of the accused. That inscription on the bottle was in lead pencil. Never at any time did that bottle, in Boston or out, contain whiskey. It started as poison and remained so in its transit, at the post office, in the carriage and stable and when it was swallowed by the victim.

He directed attention to the character and conformation of the bottle, in which no one ever saw whiskey confined. Graves knew that Mrs. Barnaby liked whiskey as a light

stimulant, and that the inscription would mislead her as to the contents of the bottle and its sender. The Doctor was perfectly competent from his study in the Harvard Medical College to compound the mixture in the right proportion, knowing that Mrs. Barnaby had a habit of taking only a tablespoonful of the whiskey. The Doctor had told several persons that it was the Bennetts, so as to divert suspicion from himself, and he knew that it was a familiar saying in the Adirondacks, "Friends in the woods."

As to the reception of the telegram by Dr. Graves at Newton Centre notifying him of Mrs. Barnaby's demise, the return telegram sent by Dr. Graves, "Be of courage; I am coming," it reminded him of an incident in the war of the rebellion when Sherman was on his famous march to the sea. One of the forts held by the Union forces was in danger of being taken. Sherman was notified and sent back the thrilling message: "Keep up courage, for I am coming." The difference between Sherman and Graves was that Sherman got there and Graves didn't. Sherman *did not* stop on the way to visit an uncle he had not seen for 30 years, but went direct to the performance of his duty. As a memorial of Sherman's order to "hold the fort," that song has been perpetrated in the service for religious gatherings, and rings through the vaulted arches of the Methodist Church at a festival observance, and has been a potent influence in bringing waiting souls to Christ. But the telegram and subsequent tardiness of the Doctor did not warrant any such recognition, religious or profane.

The voluntary surrender of Dr. Graves to the Denver authorities is not an isolated case. Boss Tweed did so, and the Spanish authorities were glad that he went, for they were fearful that he would steal the royal diamonds and the throne. The all-seeing eye was upon him, no matter how subtle, crafty and secretive the inception and the commission of the crime. As is invariably the case, its detection and his indictment came from sources that he never dreamed of. If Mr. Conrad and Hanscom on the witness stand testi-

fied to a confession that never was made they are both perjurers and murderers. As to the charges of abuse heaped upon the Pinkertons, the conservatism and manifest sincerity of Mr. Hanscom absolutely refuted the statement. When a thief and a villain and a scoundrel is brought to the bar of justice then you hear that the State is doing this and the Pinkertons are doing that. If the State does not prosecute, who will do it? The State is the concentrated will of the people and it owes no apology to any murderer for its presence in court. As to the possible contest of the Chester will by Mr. Conrad, suggested by the defense, I hope he will; I do not believe that any man should have a right to make a will. It was originally a system got up by a few aristocrats to perpetuate real estate in a line of their family. No dead man has a right to push his fingers through the coffin lids to reach his property. They are dead to the world; let them keep out of it. In recent years the murders committed were unique, romantic, subtle and crafty in their execution. In the West the taking of human life was passionate in its boldness and cruelty. This crime was conceived in New England of the cultured, novelistic type where you drop murder from kid-gloved hands into a slot in the Post Office, and by a person who was competent to carry it out, hopeful, however, that he would escape the penalty by the isolation of the State which would give him immunity from the law. As to the exercise of sympathy which had been impressed upon them by the defense, remember the difference between a false and genuine sympathy. Do your duty to the State, the Court and yourselves. That great hero, Gen. Grant's best thought in his last hour was that he had endeavored to perform his whole duty, in no other way could the jury perform the arduous and solemn obligation which had been entrusted to them.

MR. FURMAN FOR THE PRISONER.

Mr. Furman. Gentlemen:—There is at least one subject in which we are all pleased. That is that this trial is

drawing to a close. For weeks it has been a strain on all the minds engaged in it. On me it has been a tremendous burden, opposing three of the most distinguished lawyers in Colorado, backed up by \$1,000,000 in cash and Pinkerton's agency. One of my assistants has been sick most of the time, and my other associate is a stranger to you. I feel in part a stranger to you. The greatest trust one can confer on another is to defend his life. You are glad, too, that this trial is coming to a close, I know, because you have been locked up like criminals, taken away from your families, when it is customary to refresh the soul with social enjoyments—locked up from day to day to listen to dark phases of life, and lastly, to have imposed on you the greatest burden you ever had to bear.

When a man sits on the life of his fellow man he discharges the highest duty imposed by God on man. When a man is placed on trial for his life, his guilt must be determined by the jury. His honor can only pass on the law. When it comes to the testimony the jury alone can decide. Who are to be the judges who take away life? The law says they must come from the body of the people. Why? Because the body of the people will not have their minds warped with abstract principles; because the people best understand human motives.

Mr. Furman said he would not say hard words of anyone; he would leave to the prosecution that vituperation that they seemed to prize. Conrad for the State had attempted to ridicule a man into the shadow of the gallows, a solemn matter. They were upon solemn ground.

Mrs. Worrell testifies that Graves sent \$1400 in three months to *Mrs. Barnaby*, how then could they claim that \$2500 was enough. They raised a stick to crack their own heads. *Mr. Barnaby* only left \$2500 to his wife and left \$3000 to build himself a monument. Gentlemen, I do not believe that happiness belongs to the rich, as a general rule. The poor man loves his wife. It is sometimes all he has to love. But when a man boasts that he has a

million, the million has him. Such a man can have \$3000 to keep his monument in order and cut off the woman who helped him bear the heat and burden with \$2500 a year.

It was a physical impossibility for any man to cover all the features of the case and all the great mass of testimony. He would, therefore, treat only of the salient points and asked the attention of the jurors in the name of reason, justice and right. Counsel for the State seemed drawn hither and thither on the sea of passion. They had appealed to prejudice and substituted assertions for testimony. Assertions had nothing to do with this case. If it had there was no need for a jury. There are two sides to every case and it was natural that a District Attorney should prosecute with all his power. He looks through green glasses and catches the spirit of the prosecuting witness. Hearing but one side he has no right to assume the duties of the jury. We do not deny Mr. Stevens' fairness, but the defense would have no chance to reply to him. Mr. Stevens might think his arguments were correct, but whether correct or not the defense could not have anything to say about it. He therefore asked the jury to weigh all that Mr. Stevens said with the same care that he asked them to apply to his own words.

The Court instructed them that the defendant must be held innocent until he was shown guilty. What a grand principle that is when a man's life is to weigh in the scale the law throws around him the panoply of innocence. What chance would a man have who was presumed guilty? Who could stand if his faults were written about his brow and when he tried to explain, was told, "You are a liar, because you are interested in the case." The law was simply the golden rule, "that you should do unto others as you would that others should do unto you." This presumption of innocence was an aegis thrown around the innocent and guilty alike till the verdict of an honest jury was received. The issue in a criminal case is single, that is the issue of guilt. The jury does not have to find if a man is innocent, it simply determines if he is guilty. People often wonder at a ver-

dict and say, how could they find that man not guilty? That is not the same as finding him innocent.

The jury is not allowed to convict upon suspicion. It may think a man guilty, but if the evidence adduced is not strong enough to prove that, they must acquit. An indictment raises no presumption of guilt, nor does an arrest. Many men have been arrested who were as innocent as they could be.

The next clause of the instructions says that this presumption of innocence must stand until overcome by evidence. Not by vile insinuation. This is a humane provision to guard against the danger of the innocent being punished. Think of being led off by abuse, vituperation and slander and taking upon your head the blood of an innocent man. For the man who committed this crime skinning alive and burial in the deepest recesses of hell would be a just punishment. But the enormity of the crime should not influence you against the prisoner. A man guilty of a crime like this is an enemy of his race. Such a man is a monster, an incarnate fiend, and no punishment could be too severe. I ask not for mercy, but do not let the prejudice against the crime prejudice you against the man accused of it.

All the facts must point to the center as do the spokes to the hub. If these facts point in opposite directions, it is your duty to discharge this man. The facts and circumstances must be incapable of any other reasonable explanation than that of guilt. It is humanity and law to take the side of innocence, not only as written in the statute books, but as written in the Book of Books.

The instructions also bear upon the necessity for facts and circumstances being incompatible with any other theory than guilt of conviction. You can't touch my client; you can't convict him. I draw around him the circle of the law, and you cannot reach him unless you break the law.

If we can give a reasonable explanation I do not care whether there is a preponderance of evidence or not. If you cannot find that this evidence is wholly incompatible with any other theory than that of this defendant's guilt, you

must let him walk out of this courtroom a free man. Would the jury listen to the solemn instructions of the Court or to the cry of "crucify him, crucify him." This was a court of law and not a mob. The rules of law were as plain and well understood as a yard measure or a scale. The State did not touch upon those rules. He wanted to know if that was an accident. He thought not. They did not overlook anything that would help them. They fell back on abuse, to which he did not propose to descend. He did not have to use that class of weapons.

The State must prove the prisoner guilty. Concede some one had murdered Mrs. Barnaby, the defense did not have to show who did. The State could not prove by ridicule, abuse, innuendo or assumption that Dr. Graves did. They had to single him out and show that he was the guilty man beyond a reasonable doubt.

Dr. Graves might, consistently with perfect innocence, be compelled to answer often that he did not know and could not recollect such parts of the verbal testimony of a witness who was contradicted on some points as were not contradicted and were not inherently inconsistent with the known facts.

Mr. Furman said he could meet the other side on their own ground. Out of the mouth of John Conrad he would prove that Dr. Graves had no knowledge of the fact that he was Mrs. Barnaby's executor. He would show that Dr. Graves never knew this, and if he did not know it, what became of the motive he was alleged to have for securing her death? Out of the mouths of the State's witness he said he would destroy that base upon which the State had built up its whole case. Give me your attention and with the sledge hammer of truth I shall destroy every plank on the platform upon which this prosecution rests. The motive and not the act was the crime. A runaway horse might kill, a child playing with matches might burn a city, a cow had burned Chicago. To convict a man with no motive was as reasonable as to convict a poor lunatic who had lost his intellect by the hand of God.

The State must prove the motive, and it has declared that the Doctor's motive for killing Mrs. Barnaby was that he might get her whole estate, being sole executor. If it is proved that Dr. Graves never knew he was her executor the whole structure of the State must fall to the ground. He cared not how tall and stately a building was, it must tumble if the cornerstone were insecure. Without motive, without intent, there can be no crime, and this motive is the cornerstone of the whole edifice of the prosecution. If that cornerstone be of sand the whole edifice must fall.

The State's witnesses were as full of contradiction as a sifter is full of holes. Hanscom pledged the honor of a Conrad that he would not reveal what Graves told him. Mr. Conrad was never particular about the honor of his family. That was moral perjury. If Graves made a slip of the tongue or forgot a few words in a letter he was an assassin and must be hung, but this man played hide and seek with the truth at will. Conrad is a man of ruthless mind, whether crushing out a miner's strike or hunting a man to death. John Conrad's family of witnesses had contradicted themselves, and he did not see upon what grounds the State hoped to use that evidence to strangle a man. The defense is planted upon the "Gibraltar of the law" and "the plain of reason," and the fight to a finish would take place there. The Roman soldiers swore that while they slept the disciples came and took away the body of Christ. That doesn't require any contradiction, because it is false upon its face. Had they slept how could they know that the disciples came and stole the body? The jury must weigh all evidence according to the rule of reason, and in so doing to remember that the law said T. Thatcher Graves was innocent until he was proven guilty, in spite of epithet and filth showered upon his head. This presumption must accompany them: "If after full consideration you decide beyond a reasonable doubt he is guilty his blood will be on his head and not upon your hands and those of your children."

A large part of the evidence was hearsay and was composed of what Mrs. Barnaby was supposed to have said. The

Court had instructed that such evidence was not entitled to consideration unless it was shown that Dr. Graves had knowledge of Mrs. Barnaby's loss of confidence in him. The State had taken care not to touch upon that point. Should there be doubt whether the Doctor knew this or not he was entitled to the benefit of the doubt, and out must go four-fifths of the hearsay evidence.

The jury must disregard all outside influence, and must base its verdict upon the evidence only. No laughter when Mr. Belford got off his witticisms and no blubbering when Pence grew pathetic must weigh with them. They boast of a strong Western sense of duty, but what means this blubbering in court? Go home and tell your wives that the evidence produced was doubtful, but the prosecuting witness cried in the court. I can stand a woman's tears but I can't bear a man's. They will ask why he cried. Say "he cried for his mother-in-law, poor, dear thing." What does it mean, this blubbering? Is it the first sign of softening of the brain, or does it mean that the victim was under the influence of John Barleycorn?

Mr. Belford was so poisoned with prejudice that he insinuated that Mr. Macon was playing a game when he came to court feeble and worn. Not satisfied with covering Ballou with filth, with blackguarding Graves, with pouring out the vilest of insinuations against Sallie Hanley, they even attack Judge Macon, who arose from a sick bed. Don't you see what they rely upon? It is prejudice! Why didn't Belford pick up the gauntlet that Mr. Macon threw down? Because it was too hot for him to handle and too heavy for him to carry off. They dared to attack a man who is an honor to the bar.

The Pinkertons was the most powerful organization in the United States outside of the Government, and it was not sworn under the law; it owed no duty to the State. It held itself out for sale to the man with the most money, not to serve justice, but to work out the ends of its employer. It is a luxury of the rich. Put a millionaire behind that Pinkerton conspiracy and they would come mighty near taking any

one of you out of that jury box and convicting you of crime. All testimony should be closely scrutinized in a case where there was so much reason to suspect. If this is not done, farewell to the rights of any poor man should a rich man pursue him.

They say that Conrad has no object except to procure law and justice. Didn't he blubber right here in court? But what about never inquiring about his poor old mother-in-law? There must be a great change here. The only change in sacred or profane history equal to this was that of Saul of Tarsus, and it took a light from heaven to change him. What light has broken on John Conrad? Governor Conrad, God save the mark! Senator Conrad—angels defend us! This man, who says his father-in-law's estate was \$1,750,000, but he don't care for that; he didn't even look into it. Why, then, does he wish to crush miners striking out in Montana? He swore that he was not interested in the wills, because he wanted to show that he had no motive. Belford said that he ought to break those two wills. If he does he will collect all these costs out of that money. And he says: "But I don't care for that."

Gain was not the most powerful motive. Stephen, the first Christian martyr, was stoned to death outside the gates of the city, because the priests hated him and suborned witness against him. The motive there was not gain. Conrad says he never heard of Graves. How can he reconcile that with his love and care for his mother-in-law? Whether he heard of Graves or not, it is plain now that he blames Graves for making his father-in-law's estate lose \$105,000. But there is another and a better one. He says he went over to ask Graves to talk of the horrible things said about his mother-in-law. At that time he boasted that he was John Conrad of Virginia. There is nothing that deeper insults a Southern man than any rumored reflection on the women of his family. They settle such things as that down South with powder and hot shot. He could not do that in the North, because a cold-blooded jury might swing him. So he said:

"I'll not run the risk of a trial; it's safer to try Graves. I'll put the Pinkerton detectives on his track."

Mr. Belford said that circumstantial evidence was as worthy of credence as direct evidence. Circumstantial evidence at once raised two questions. The first, were the witnesses telling the truth; and the second, was the inference drawn from the circumstances correct? Though it was said circumstances could not lie, he thought that circumstances as ordinarily known were the greatest liars on earth. Every day friends were estranged, wife and husband sundered and no end of trouble created by misunderstanding of circumstances. He would not do as Belford said, seek out horrible cases of mistakes on circumstantial evidence. This case was not so desperate that such means were necessary. He would merely quote an example from the word of God. You know the story of Benjamin getting into difficulty over the finding of a cup in his sack, put there by Joseph for the purpose of bringing him back, but for which he was accused of theft. We need quote no blood-curdling instances, because the word of God need not be strengthened by any other book or record.

Mr. Furman then took up the evidence of *Mrs. Hickey* and the corroboration which it received from others. The Pinkerton agency accounted for that corroboration. *Mrs. Hickey* swore that *Mrs. Barnaby* told her that *Dr. Graves* had asked her to sign a paper that *Maud Barnaby* was not her child. *Mrs. Barnaby*, she said, "kind of laughed."

Think of the impossibility of any mother for a moment entertaining such a proposition. Mother love is the strongest on earth, the emblem of God. It follows even a criminal son to the lowest depths, and would raise him up again. They claim that she was an imbecile, but that was contradicted by their own evidence, because if she were an imbecile the executors chosen by her husband would not accept her receipt. Tell me that any mother would entertain such a proposition. Would any mother brand her young daughter just merging into womanhood? Did you ever hear of a charge so monstrous and repulsive to all that is holy? Is there anything half so in-

famous they charge Dr. Graves with. And it comes from their own witnesses. We are here not to war with Mrs. Conrad. We come here to defend her. No, no; it is not true that Mrs. Barnaby was capable of listening to so horrid a proposition. But you must believe it if you believe Mary Hickey. It is a libel on motherhood and an insult to any respectable jury to ask them to believe it.

As to the Doctor's alleged statement to Mrs. Hickey that he didn't know how long Mrs. Barnaby was at his house and he didn't give a d—n. Also, that he had a row with Mrs. Barnaby. Why would Dr. Graves go about making statements that would injure himself if he was plotting to kill the woman? Why tell Mary Hickey, who was claimed to be a near friend of Mrs. Barnaby? She would surely tell. If the mother and father of Mrs. Barnaby committed her to the care of Mrs. Hickey, that indicated they had not much faith in the happy family theory.

Tell me that, or you explode the idea of this happy, angelic family, this exquisite family. They say that after his death there came a tramp or adventurer to poison her mind against her dead husband. A woman's strength is in her affections. It is so indeed, or I don't know how she could bear our trifling. If a woman were constant, do you tell me she would believe aught against her dead husband? Suppose a man came thus to the wife of one of you; he would do it at the peril of his life. The affection of a true woman cannot be shaken in that way, especially when the clods of the valley have fallen upon his cold corpse. Then the way to incur her anger is to speak disrespectfully of the strong arm and warm heart that had defended her.

The prosecution laid great stress upon the fact that they had more witnesses than we had, and seem to construe that as a preponderance of testimony. I wish to reply to that. Quantity does not make weight. As the sacred writing tells us, ten out of twelve spies who went to spy out the land of Canaan returned with an evil report, while two of them controverted it. What was the result? The children of Israel listened to the majority report and retired to the desert. When Israel

later entered the promised land they found that the minority report was true. Both were honest, but the ten were mistaken, and the preponderance was with the two because they did not allow their fears to mislead them.

Our duty is, if possible, to harmonize variation of testimony, so far as we can, and not call witnesses skunks and liars if they disagree. We should adopt the standpoint of humanity whenever we can. With that in view I wish to review the testimony of Mrs. Worrell. She testified that she wrote to Dr. Graves that Mrs. Barnaby and herself would arrive at Denver on such and such a day. She later testified that when she wrote to her family she could not tell when the pair would arrive here. Will you hang a man on such contradictory testimony as that, because certain persons are thirsting for his blood? Gentlemen, this trial reminds me of an incident that occurred in the life of my father. When I was a boy he went to England, and the ship was caught in a terrific storm. Hope was almost lost. After three days of despair that ship emerged from the storm in sight of land, with a port just before. That is just like my client. Driven by the bitter waves of persecution, he emerges from those dark and gloomy scenes, and sees an honest jury of his countrymen, knowing that they will do what is just and right under the testimony and the law.

Now I wish to review the testimony of Mr. Hanscom. Mr. Hanscom looked to me like a witness who wanted to wash his hands of a dirty job. Hanscom swore that he sailed under false colors. He acted a lie as "Charles Conrad." Is it not worse to act a lie than to tell one? Ananias and Saphira were struck dead in their tracks for doing just what Mr. Hanscom did.

He went farther, and said that he deceived a man that he might gain his confidence and get him to swear to a lie. Besides that, Mr. Hanscom said he told Dr. Graves he thought it might have been an accident that led to Mrs. Barnaby's drinking poison. The evidence of his deception is enough to make his testimony a stench in his nostrils. Judas Iscariot betrayed the Saviour of the universe with a kiss, and had

been the type of falseness. Hanscom evidently wanted to sustain the reputation of the Pinkertons for sure detection of culprits.

Now they are talking about Graves because he forget the contents of his letter, with such a falsifier on their hands. If you are going to throw out Graves' testimony, what will you do with Hanscom's? If you are going to throw out testimony because it is contradictory, there will be nothing but the indictment left. Are you going to give a verdict for the prosecution just because Mr. Stevens is going out of office, and so give him a send off? I don't believe that you will be moved by any such favoritism as that. But let us go on with Mr. Hanscom. The detective said Dr. Graves confessed to sending a bottle of whiskey. Mr. Belford quoted him as confessing that he sent that bottle. Beyond that, Hanscom swore on the honor of a comrade not to repeat the confession in a court of justice. Isn't your word of honor as sacred as your oath? What shred of honor is left to Hanscom, who, without asking the Court to absolve him, forfeited his right to respect or credence? His proper place, in my judgment, is President of an Ananias Club.

Now, what shall we say of John Conrad's testimony? He appealed to Dr. Graves' chivalric regard for woman. He seemed to be suspicious of his own word. Will you believe a man who hardly believes himself? Conrad said if you will go and talk over the matter with my wife it will do her good. Did he mean that? Talk about Johnny, who sat there and bo-hoo-hooded. The Montana people had level heads when they elected him to stay at home. What more did he do? When he was plotting to make that woman (Mrs. Graves) a widow, he took a nosegay from her hand and said, "I will make arrangements for you to meet Mrs. Conrad in the near future." If he was trying to deceive that woman, why should you not believe, gentlemen, but what he is trying to deceive you, and have you assassinate Dr. Graves? I'm just going to handle him the way I want, the way he laid himself open in his testimony. Now let us see what else Johnny says. He tried to create the impression that he does not

drink. He ought to pull down his sign then. He got a woman to come and say what was not true. Would it be hard for a man who got Mrs. Smith to tell what was not true to get Mrs. Hickey to come here and testify to what was not true? Is Hanscom or Conrad any too good for that? Gentlemen, as you expect to give account of yourself before the bar of God, prove all things; hold fast to what is good; abstain from every form of evil. Are you going to find a verdict on the testimony of plotters and liars? If one man can be hung on such evidence, why may you and I not incur the enmity of a Montana cattle king and get Pinkerton hounds on our track.

Suppose you throw Graves' testimony all out. What are you going to hang him on? Are you going to sacrifice life so cheaply under the shadow of the Rocky Mountains, whose peaks are suggestive of eternity, and disgrace this proud Centennial State with the spectacle of life so cheaply held.

Let us look a little longer at Johnny. He says to Graves, "come over, Doctor, and let us talk about the will," and yet he said in his own evidence he didn't care about the will. He used it as a bait, or as he says, he used it as an excuse for getting the Doctor to talk about the bottle. If Graves had already confessed to sending the bottle, why did he need to talk about it any more? Let's hear from Johnny again—this "rugged son of justice." Johnny ought to put over his door a sign I once saw in Texas, "all kinds of twisting and turning down here." What does little Johnny say? "I told him (Graves) I felt it was necessary to publish him in the papers," but he said in his testimony he did not feel it necessary. But he is worth a million. What cares he for the truth? But if I were to spend the time pointing out all of Johnny's contradictions, this argument would never come to an end.

Juror Sterling. We have been listening to stories, your Honor, for several weeks at the hotel, what we want now is the law and the evidence.

Mr. Furman: Now, let's compare Conrad's testimony and Hanscom's. Granting they are consistent in themselves, let's

see whether they cross each other or not. "It was never mentioned that Graves should sign a statement," was Conrad's testimony in regard to the confession. Hanscom testifies "I think Conrad asked him to make a statement in writing." Which was right, Johnny or Charlie? Again, Johnny testifies, "Graves said bring in Howard; I sent that bottle, and I might as well go to hell by one route as another." What did Hanscom testify? "Graves said I sent a bottle," etc., and then he went on to explain that the Doctor did not particularize as to the bottle or Mrs. Barnaby. Oh, yes, hang Dr. Graves because Johnny blubbered.

Mr. Furman said he was mindful of the admonition of Juror Sterling to desist from story telling; in the rest of his argument he should confine himself to as brief a limit as possible. There was a contradiction of the statement of Conrad and Hanscom. Counsel had to corkscrew the statements from Hanscom, which, when obtained, failed to corroborate the reckless statements of Conrad. Their testimony was at variance on the point as to whether there was any quarrel between Conrad and Graves. Conrad saying that their relations at the interviews were pleasant and harmonious, while Hanscom said that there were loud and boisterous words.

Mr. Furman then referred to the banishment of Mrs. Barnaby from Providence, and said that on reading the full correspondence, which Judge Belford did not do, it would be found that Mrs. Barnaby was at the Bennetts and traveling with Mrs. Worrell. If the Doctor desired to get Mrs. Barnaby into his power he would have kept her in Providence rather than permit her to travel. The fact was Mr. Barnaby by his will banished Mrs. Barnaby from her home and friends. As to the question of motive, by Conrad's testimony it was shown that the Doctor did not know the contents of the first will till after Mrs. Barnaby had died. Ballou and Graves were charged with fixing up the will, but it was shown that the testatrix allowed her love to pass over the daughters and reach the grandchildren, who received the largest bequest. The reason that Col. Ballou took so much time in drafting the will was because he wanted

Mrs. Barnaby to carefully consider the avoidance of estrangement with the family. As to the charge of conspiracy by Ballou and Graves in Chester, Mrs. Barnaby created Dr. Graves her sole executor with a bequest of \$25,000; the daughters and grandchildren received more money under the Ballou-Graves will than under the midnight will of the triumvirate in Chester. Was there not more likelihood of connivance in Chester than by these "two precious scoundrels," as they have been termed by the Government. The Doctor was willing to turn over the property at any time. If he desired to control Mrs. Barnaby he would have had no trouble according to the State's testimony, as she was an imbecile and helpless.

If the Doctor wanted to cover up his conspiracy to secure the estate he could have falsified the accounts and presented them in court. In regard to the claim that the Doctor had purposely lost his account books, Mr. Conrad in his testimony admitted that the Doctor had requested him to go to his house with him to look over the books, but that Conrad refused. If the Doctor had been dishonest he never would have volunteered to let Conrad see them. The Government could show no motive for the commission of this crime when the chief prosecuting witness had recourse to the books.

It was significant that in the second will Dr. Graves got \$25,000, while Mrs. Barnaby cut off her own flesh and blood, and he was not present in person nor by a friend. Nothing but pretense had been indulged in by the Government to show dissatisfaction on the part of Mrs. Barnaby with Dr. Graves.

We know that by letter and telegram up to the time of her death Mrs. Barnaby expressed her confidence and esteem for the Doctor and his wife and mother. He did not believe that the Worrells were guilty of the crime, but if he had the time he could riddle the Government evidence and show by inference and direct statement that there were stronger suspicions against that family than Dr. Graves. As to the considerations of the Doctor's actions while in Denver at the time

the body of his friend was at the undertaker's, the jury could not hang a man on breaches of propriety.

Coming back to the confession in the Barnaby house, the testimony of Mr. Conrad is indicative of revenge and selfish interest, growing out of the reduction of the legacies to his children and the settlement of the estate, whereby Mrs. Barnaby received \$105,000 through the intervention of Dr. Graves and Col. Ballou. It would not work, it was too thin that Dr. Graves voluntarily and without anger confessed to sending the bottle and then went there repeatedly afterwards. If he had made the confession what was the necessity of any subsequent visit. The night when the confession was said to have been made the Doctor had been threatened with degradation and death by Conrad unless he signed the confession. The Puritan blood in the Doctor's veins rose to the test and he disputed the confession and dared them to proceed with their conspiracy to hang him.

If Dr. Graves sent that bottle he was a villain of the deepest dye and hanging was too good for him. There should be no compromise verdict. Break his neck, or turn him loose.

He thanked the jury for their careful attention to the arguments in the case. He believed that the jury would render a just and honest verdict, and urged them to weigh the evidence judiciously and impartially so they could stand by their decision when before Almighty God to answer for the deeds done in the body.

DISTRICT ATTORNEY STEVENS FOR THE STATE.

Mr. Stevens. Gentlemen: I now arise to perform a duty I would gladly see some one else assume, not because of the defendant on trial, but of the law-abiding citizens of Colorado. We have heard a great deal about this life in the balance and whether you would take it. Gentlemen, you and I are sworn officers of the State. It is your duty, as it is mine, to consider not the consequences of your verdict, but to say to the people here today that their laws shall be faithfully enforced. It is for a cause we are here in this temple of justice. It is

the institutions that we are here to uphold. What is a life compared with the prosperity of this Government? In the last war thousands of lives were sacrificed to sustain the glorious Government we live under. I remember reading an incident of the late war. One army beside the Rappahannock played the tune "Star Spangled Banner." The other played "Dixie." But both joined in the tune of "Home, Sweet Home." You are taken from your homes this most happy season of the year as you would shoulder a musket to fight for your country and its laws. That is what this trial is.

It has been charged there is a conspiracy to take this man's life. If so, I am the chief conspirator. I alone am responsible for this man being placed on trial. If there is a conspiracy I must be the most infamous murderer in the world. A great deal has been said about the Pinkertons being engaged. What difference does it make what power brings a defendant into a court for the trial for the most heinous crime known in history? It is demagoguery. Would you acquit him because the Pinkertons furnished some of the evidence? Whatever they did they have testified to you. A Pinkerton detective has not had aught to do the last three months in preparing this case. It has come to you through the legitimate channels of the State. The gentleman in opening said he had no complaint to make against the District Attorney. If so, no ignominy is to attach to any one connected with it.

Gentlemen, I know your responsibilities and your sacrifices. But for three months there has been no greater slave than the prosecuting officer of this Court. A conspirator to take this man's life? Gentlemen, it is ridiculous. They say I have a vast amount of interest in this case. I receive \$25 for trying it. I believe nothing has been done by the prosecution that was not fair and upright. As I went home night after night, through this slumbering city, you cannot understand the responsibility I felt. Not alone our institutions were at stake, but the fame of this State and the good name of the people were at stake. Counsel says the prosecution wants to convict so as to add to his personal fame. If that

were true I would be a monster. I hold the office I have been filling in too much respect for that. Innocent blood can add to no man's laurels. The District Attorney is an officer of the people. No hope of private gain can rob him of that idea. It is too often the case that cold-blooded assassins are surrounded by people willing to do anything to secure their liberty. When have you seen the District Attorney surrounded by people who believed their homes in danger?

Those charges of the defense are not new. They have been known from time immemorial. I want to quote what Daniel Webster said in the famous Knapp case in 1830. That was a case of circumstantial evidence. It was similar to this one. Two wills were resurrected, and an old man aged 82 was assassinated under the guidance of his nephew, who always expressed regard for him, as this defendant always expressed for Mrs. Barnaby. Mr. Webster's words were on a parallel with this case. At the time he spoke them he was a United States Senator. He was called a conspirator, to take the life of an innocent man. (Reading from Daniel Webster's speech.) You see, the same arguments were used 60 years ago. The prisoner is hunted, persecuted to his trial. That is Graves, according to Furman. They want you to think that John Conrad, who has saved this county an expense of \$35,000, without hope of reward, would perjure himself to hang an innocent man. I want to say that whether the accused is convicted or acquitted, the \$25,000 left him will remain intact. If the testimony is honest, it makes no difference how it was collected.

You see, this case at bar possesses every element of the Knapp case. Cannot a hand be lifted to condemn the guilty without being charged with infamy. The defense has complained that the newspapers undertook to manufacture sentiment against him by publishing the truth. If the newspapers had not published the truth, you and I and every law-abiding citizen would cease taking them. Cannot this community arise and denounce the perpetration of such an infamous crime? Judge Macon, sitting in his easy chair, I think he has recovered somewhat now, talked about the vil-

lainous newspapers, and then read from them to secure facts for his address.

If there is one class above another that deserves credit for what they do, it is the young men who sit at yonder table, who sleep not at night, ferreting out crime and collecting the news for you to read at the breakfast table. Every unpunished murderer takes away from the security of every man's life. This has been only too true in this community. Crime breeds crime; but unpunished crime breeds crime ten times as fast. We showed that when Dr. Graves was in Denver he followed the Millington case. It was one of arsenical poisoning. Ten days after Dr. Graves returned to Providence this bottle was made. Arsenite of potassium is now known all over the civilized world. If you acquit this man because of sympathy in this city, a similar crime, in a fortnight would be committed a dozen times.

There is another matter I desire to disprove before I take up the evidence. I think when you go to your jury room no one will say that this defendant has been treated unfairly. His whole life was an open book, but the State confined this case to the actual commission of the crime. Graves it was pretended, did not know he was executor under this will. His cross-examination proves he did. Two lines of the testimony of defendant contradicts two lines of his counsel's speech.

They made a great deal of capital discussing a part of the instructions. I want to call your attention to the other part. They must be taken all together. You must be satisfied of guilt beyond a reasonable doubt. But you do not have to be satisfied with every little circumstance. You must be satisfied taking all the evidence as a whole. You must act as you would, being reasonable men, in the transaction of business. You are not at liberty to disbelieve as jurors if you believe as men.

A reasonable doubt cannot be founded on any sensibilities as to the consequences of your verdict. The Court says so. The defense took six hours to try to convince you otherwise. You should not indulge in fanciful or remote conjectures.

If from all the evidence you have an abiding conviction of the guilt of the defendant, you are convinced beyond a reasonable doubt. The Court says you must not be influenced by what you have heard before being selected as jurors.

Graves was the sole executor without bond. He wanted to know what his powers were. That proves that he knew. The instructions of the Court are founded on statute. If the defendant sent this bottle, it makes no difference whether he wanted to get control of the estate or to commit crime. These wills have been discussed so much, I will not go largely into them.

All the circumstances under which these people became acquainted, his ardent attention to supply every want till he secured all the property under her control, showed his motive. All his letters are full of flattery. They showed what the writer was trying to do. His object was to secure ascendancy over her mind. He said she was a good patient, who paid promptly.

Have you ever figured out how much income Mrs. Barnaby received from the \$105,000? They reflected on her husband because he left her but \$2500 a year. Graves said he received 2 1-2 per cent interest on balances. On \$100,000 this would be \$2500 a year, about. He was very careful that she didn't get any principal. He invested about \$60,000 in stock, transferred \$10,000 to his own account, and could not account for the balance. If she had returned the first of May there would not have been a cent in the bank for her. Suppose the stocks—all her money was tied up. They say it was a shame to leave her but \$2500 a year. Now, how much income would she get for the money in stocks invested by her physician and lawyer? If the stocks brought 4 per cent she would have but \$2400 a year. That would not pay Graves' salary. They say an income of \$2500 a year was an outrage, but the income from these stocks was something magnificent.

Hasn't it occurred to you that the defense has indulged in a good many things that were illogical and irrelevant? They were nearly six weeks getting evidence from a livery stable, and yet none of these lawyers referred to their

testimony. It was an insult to your manhood to call such perjured witnesses. They called two horse doctors. If you met them in a dark lane at night you would want a six-shooter. Then they put on the stand the wife and mother. If they had any defense at all, it was based on the statements of these women, who went to pieces in the cross-examination. The defendant lied to his wife, and admitted it. He lied to this old deceased lady, and admitted it. Would he not also lie to this jury? True, as Mr. Furman says, lawyers are partisans. After his address, that cannot be disputed.

This man who lied to his wife and Mrs. Barnaby would not hesitate to lie to his lawyer, as well as this jury. Dr. Graves proved himself to be a rank perjurer. He denied statements that under pressure he admitted, and when he finally confessed the Lincoln interview, Judge Macon left this court room with a look of disgust, and did not return till he delivered his speech of the other day. The defense has outlined the duties of the prosecution. I call their attention to their own duties.

If Graves didn't mail the bottle in Boston, what is the use to call witnesses to try to prove that it was tampered with at the Empire stables? Have we tried to mislead your minds in this case? If this man were innocent, where would these books and papers be? Suppose Conrad said he would be brought in chains. Charged with this crime, what did he do with the papers he says would acquit him? Do you think they have shown any honesty in this case?

We want to get at the motives in this case. The grand jury investigated it thoroughly. No indictment was found versus Graves till long after he came here. If he had any knowledge of this case that would not convict him, there would have been no reason why the defense should advise him not to appear before them. He must have told them something that showed he was guilty. They made him a defendant, we did not.

No sooner was the contest begun by Mrs. Barnaby than the two wills of Mrs. Barnaby were made under the advice

of Dr. Graves. The latter says he never knew what was left to him in the will. Do you think Ballou, so obligated to his old schoolmate that he gave him \$500 for bringing him a client, did not tell him about the provisions in the will? But I must hasten, gentlemen. I do not propose to take up your time with stories and Scriptural quotations.

Now, the wills are made, and Mrs. Barnaby is hurried to Saratoga and Florida. But two other times was she in Providence, and then to sign papers for Graves. On May 8, 1890, the day she arrived, she gave him a full power to invest her money. She had just returned from Florida. Now, I want to read you some of his Florida letters to show you how skillfully and adroitly he laid the basis for this.

[*Mr. Stevens* read letters in which defendant said Mrs. Barnaby's property should be as carefully guarded as his mother's; called one of Mrs. Barnaby's daughters a "she dragon;" told of the "awful" Providence weather; spoke of chances to make a couple of tens of thousands for his principal; said chances coming to him always; another reference to the "she dragon." He read the "investment" power of attorney given May 8 to Dr. Graves.]

It gave him care and power to invest all her property of every kind. Dr. Graves was very progressive. Do you suppose this old lady knew what power she was conferring? Do you think she knew the import of the paper without the advice of some legal friend? No man without an ulterior motive would ask for such a power from a poor, weak, defenceless woman. After getting control of her money, he wanted a power to invest as he might wish. I doubt not that he would have exchanged the real estate for bonds if he had seen an opportunity. Next, when she returned to Providence, Dec. 16, without giving her an account, he too a receipt for \$16,000, including his own salary. If Col. Ballou could not find the books in Providence, they were destroyed long before he looked for them. I am not surprised they are not produced in court. Think of this

man binding this woman for \$16,000 without giving her an account. You remember the guardianship letter was forwarded to Col. Ballou. This man, so far forgetting his oath, so far forgetting decency and this woman's age, did not answer her letter. There must have been a powerful motive behind this.

Col. Ballou, as he spoke, impressed me as a careful man. There must have been a powerful motive. He sent for defendant and they conferred, as one friend with another. He asked what condition his accounts were in. For, if the agency were terminated, some of her friends might go into court and ask for an accounting. Then comes Dr. Graves' flattering letters again. Mrs. Barnaby goes to Providence Dec. 16. She is driven to defendant's house. The receipt for \$16,000 was signed the same day. Thus the accounts were placed in good shape. Everybody is estopped from going behind the returns. He swore that it took him three days to get her into the humor to audit the accounts. The receipt bears the date of Dec. 16. Writing cannot be gainsaid. I have no doubt that he convinced this old paralytic that he had some money of his own. The receipt reads for money paid out at times when it was not convenient for her to give receipts. Graves must have known that he was losing his control over this old woman.

Sallie Hanley wrote about the purchase of the house. Mr. Bennett informed her about the changing of the will. Now, if Sallie would write about the house wouldn't she also tell about the will? Thus he saw his influence was waning and to square his accounts he demanded this receipt of \$16,000, of which \$7,000 cannot be accounted for. Mrs. Barnaby told Mrs. Hickey at this time that she wanted to change the management of her property. She was prevented from this by Graves' representation that she owed him money and that the transfer could not be made at that time.

So, this crisis is passed. Other tactics are used. Sallie Hanley is engaged, so she can influence the deceased, when

she was out of sight of the defendant. Then comes the letter from Chester asking for the old will. This case now begins to expand. The defense boasts that the letters were always friendly. Of course, they were. Do you think that he would leave undone anything to influence the mind of this woman? She being a lady, she answered him in polite terms. They say this man always addressed her letters to her accurate address. Here is a letter in which he says he writes her three letters addressed to Denver, Colorado Springs and San Francisco; he admits in this letter that he knew her Denver address.

In March, Dr. Graves' brother dies. He came to Denver. He took some interest, he says, in the Millington trial. He returned to Providence. Soon afterwards the bottle was mailed. Judge Belford says this was a New England crime. The three famous murders of this country were committed there for greed, for gain, and all the criminals were convicted on circumstantial evidence. When Dr. Graves was here there was a great deal of trouble proving what was the real cause of death. Most people were persuaded that it was most difficult for arsenic to be detected. All these facts worked on his mind, and he determined that rather than part with this woman's property, he would poison her.

But you say, how do you know that he would commit murder? Why, a man who would lie to his wife, perjure himself on the witness stand and write a letter of threats to a helpless, old, paralytic woman would, of course, commit murder. A man who, on the way to the tomb with the body of his dead friend, would say that she was a vile woman and had lovers would not stop at murder.

The awful expression he used toward her in his office, the morning he spent with Messrs. Lincoln and Trickey, indicates a murderous heart. Mr. Furman says Graves did not say that. But Col. Ballou admitted that he was willing to make such charges in the contest suit. Do you think his present client wouldn't do it?

Now, he went to Boston to buy stocks. The bottle was

mailed in Boston. Now, as to the stamp question. Dr. Graves said he bought stamps in Providence in large quantities. Having the bottle, there remained but one thing left to do after he had obtained the \$80,000 and invested nearly all; transferred \$10,000 to his own account without any explanation; and, of course, he got a commission on the stocks he got, if he got a paltry commission of \$500 from Ballou. Her bank account is depleted.

The defense says he wouldn't have bought stock if he had intended to rob. Of course, he would. If he had kept the cash he would have been compelled to disgorge. Having taken all he could get out of the poor woman's estate; having knocked down \$7000 in the \$16,000 receipt; having taken \$10,000; believing the family of the deceased would take no interest in the matter, do you believe there was a lack of motive? He thought there was no danger of investigation. Why, he might have paid par, and he might have paid more. How much of a motive do you want?

Now, I propose to take up the crime itself. It has been charged that Mary Hickey came to Denver and committed perjury—this old woman, who has made the living for her children ever since coming to this clime. They are the warmest-hearted people in the world. Is there anything unreasonable in the fact that Mrs. Barnaby's mother should request Mary on her deathbed to care for Mrs. Barnaby? I will spend some time on Mrs. Hickey's testimony.

She knew Mrs. Barnaby about twenty years. Did you ever know any one who was swearing falsely to go into such details as did Mrs. Hickey? She was very minute. Dr. Graves denies having talked with her, but I think he would have done better to have claimed a little friendship.

The evidence of this witness shows that blasting the name of a child was not enough. But he strove to induce this woman to regard this dead woman with contumely and contempt by telling that, if a mistress got \$100,000, she should have more. And they say that this conversation never occurred. They say it was marshalled by the Pinker-

tons. I am responsible for the marshalling of this testimony, and it was told for the first time, with all the condemning terms, by Mrs. Hickey.

Will you take her story, uncontradicted by cross-examination, or his, who has proved himself a perjurer; who only told the truth when he did not have time to make up a lie. This story about a mistress was wholly a lie, designed to cover with contempt the memory of a devoted husband. The reputation of a girl was to be sacrificed on the altar of his greed. The woman who had befriended him had to be stigmatized with the vilest of names when she lay still in death. He has not given you a single reason for saying that Mrs. Barnaby had lovers. Without any justification whatever, why does he indulge in such language against his benefactress when her body is on the way to the tomb? Isn't that horrible? Of course it was wrong to send a telegram decoying away his wife. But he makes an attack on the defenseless dead. What was his motive?

On the stand he said that he was surprised that Mrs. Conrad came to the funeral of her mother. He knew that Mr. Conrad was coming and that an investigation had been begun. It was the same motive that impelled him to write the threatening letter to John Conrad after this trial began; the motive that induced him to say to Mr. Conrad, "If you give me any trouble about this I'll heap up scandal 10 feet high about the Barnaby family." He wanted them to scare away the prosecution. When he wrote the letter of Dec. 4 he tried to scare Mr. Conrad from taking the witness stand. Why didn't Mr. Furman and Judge Macon refer to this letter? They knew a man who would write it would do all that has been charged against him. Gentlemen, Mr. and Mrs. Conrad both attended this trial. There was no delicacy about their going into all the details.

If this man has righteous justice meted out to him they will be recompensed for all these villainous attacks. They try to justify this man by that old lady and his wife, but they knew nothing about the import of the \$16,000 receipt,

Mrs. Hickey told about. She said that Mrs. Barnaby and Dr. Graves had a fuss about that receipt. Mrs. Hickey said Sallie Hanley was a spy. She said Dr. Graves told her so. He denies this. I will spend no time discussing that. It's true she did spy on Mrs. Barnaby, isn't it?

Now, gentlemen, that is all of Mrs. Hickey's testimony. But I must read Dr. Graves' letter about the painting. It was sent to Mrs. Barnaby. There is nothing of Mrs. Hickey's testimony that Dr. Graves doesn't corroborate when he tells the truth. When Graves was on the stand he denied the whole transaction. He denied he ever talked to Mrs. Hickey. Now, gentlemen, this bottle bears every fibre, lineament, color, shape, general appearance, of murderous design and intent.

Look at the label. Is there an honest feature about it? If you received a bottle like that from a friend, wouldn't you look on it with suspicion? One thing gave her confidence in it. It was the line "Your friends in the woods." This is a New England bottle. Dr. Graves said "H. T. & Co." meant Henry Thayer & Co. He said a great many are used in New England. It was mailed in Boston with an attempt to deceive. A bottle containing genuine whiskey wouldn't be put up in this sort of a concern. They pack whiskey in Providence with an honest brand on it. Learned counsel for defense avoided any reference to the inscription. It has been handled a great deal and is getting defaced. But if you will compare the writing with his letters you will be convinced that Dr. Graves wrote both. Of course the letters are disguised somewhat, but they are indisputably his. Take the reasons given by Prof. Carpellier and you will see the writing is Dr. Graves'.

We have gotten down to this: This is a New England bottle. It came from Boston. The stamps were bought where they were for sale. They were for sale in Providence. Dr. Graves was there where he could have bought them. He bought them one day when he was going over to Boston to buy stocks, and he just slipped this bottle into the mail.

You must judge of the motives of the mind by one's deeds. The conscience of Dr. Graves could not help showing itself in his actions. He dropped in on Mary Hickey. She is the sort of woman one would wish and feel like telling the secrets of his life to. She said he was excited and "tired." "Tired" was a frequent word of his.

Then came the dispatch from Mr. Worrell. Then the one announcing death. He said he was at Newton Centre. He says he consulted his wife and asked her advice, and then he says he promised her to come at once, when even she was sick. Here was the beginning of the haunted trip, where conscience battled with physical effort; where ghosts inhabited the night and phantoms of evil infested the day. He hesitated about going, and consulted his mother. She said it was his duty. He saw she wanted him to go. We don't claim he should have hurried here, but the wonder is that he ever got to Denver at all. Providence is about as large as Denver. He went to the depot (and these circumstances are most important, as they reveal the man's conscious guilt), and instead of going directly to Chicago, he went to New York. He left Providence at 1:15 a. m. He left his house for the depot at 10:30. We may never know the torture he suffered enroute to New York. He goes to Chicago. Just before arriving he began to feel ill and said, "I'll stop at Sterling to see an uncle I've not seen for thirty years."

He arrives at Sterling. The roads were muddy. He could give no account of the journey there. He arrived at 4:15 p. m. and stayed an hour and a half, according to his own testimony. As a matter of fact he did not leave till 9:30 o'clock.

Having stated that he was attacked with grippe, he didn't take any medicine. But he makes the remarkable statement that the trip out to his uncle's did him good and the trip back did him harm. I believe that was true. I believe he felt a momentary relief when he was being whirled away from the dead. It was a hard ordeal to have to start west-

ward again. He couldn't come through. He dawdled along. He stopped at his cousin's at Cedar Rapids. How closely he watched the papers to see if there was any suspicion of poison—to see if there was a probability of discovery. He was feeling his way along. He watched the papers. The secret was not yet known. He thinks he may be safe in coming, so he timorously took the slow train and arrived in this city.

He said on the train coming into Denver "he had a good time." What expressions! Coming as the agent of his benefactress. Coming for his dead friend. Coming to prevent her diamonds from falling into the hands of strangers. Coming because he promised to. Do you believe these stories? The crime out of the way, he would have taken the fastest train that ran to get those \$20,000 worth of diamonds. What deterred him? When he wanted to invest her money he lost no time. He lost no time laying his claws on the \$80,000. He came on a similar mission shortly before. He took the shortest route. He lost no time. He made no stops. Now this man could have left Providence on Monday morning and arrived here on Wednesday evening.

It was a haunted trip. Did he send any telegrams as to whether he was on his way? No. Did he know the body was here? No. What's the explanation? If this man were honest he would have lost no time. It was the conscience that kept him back. He arrived Friday. He went to the Worrell house. He felt his way. He arrived at 7 o'clock. He went to the Worrell house at 10 o'clock. He read the papers first. Nothing about the cause of death. It's an unsuspecting community. He went to the house. Those he met say he was agitated. He says he became so after he learned the cause of death. He asked no questions about it. He didn't ask about the suspected criminal, but he exclaimed: "Well, it must be the Bennetts." Think of it!

His Honor says you must seek your verdict in all the circumstances. If he had been an honest man he would have

said, "I am a physician. Let me see the bottle. I can detect poison. Let us seek the criminal." He didn't do so. There was an excellent illustration of a dishonest man here. Mrs. Allen could not catch his eye—a dishonest man. When he learned Mrs. Conrad was here he jumped up out of his chair. Knowing she was here, and knowing poison caused death, his conscience could not be controlled longer. It leaped into his brain. What was his excuse for being delayed? He said he missed connections in Chicago. He didn't tell the truth like an honest man. He goes to the Worrell office.

He learns an autopsy has been held. He hears that the bottle is being analyzed. He does not inquire about her suffering, or any of the circumstances of her death. He meets a man here, Dalzell, goes to a saloon and gets a drink, and then makes an engagement to go to a ball game. If he had been an honest man, don't you know that he would have spent the day with her friends? At the depot he seems surprised again when he heard that Mrs. Barnaby is dead. Then comes the trip eastward and the Jersey City affair. Mrs. Conrad told you about it. Graves hurried on to catch the boat. Think of it—traveling with a funeral party. He hurried on and got to the New York Central depot, and took the first train to Providence. He changes this afterwards. His whole testimony was one of forgetfulness, except in cases where it was important for his defense to remember.

He went to the telegraph office in Providence and admitted all the Lincoln interview but the ice house story. Of course, he said that all this scandalous and abominable talk never took place. Mr. Lincoln testified to his interview.

He goes to his house and is interviewed in the morning. He said all that was reported from that interview also. The facts surrounding this interview were these; Mrs. Graves arrived from Providence that morning. Her brother was with her till 7 o'clock. The family was up at 7 o'clock. Mr. Lincoln says he arrived at 7:30 o'clock. We have

all consideration for these two ladies. We do not blame them from testifying in behalf of this man. He was down there at this time or these facts could not have been obtained. They were news.

I can explain the reason Dr. Graves denounces the Boston Herald. That paper investigated the Sterling and Cedar Rapids stops. The statement made in the interview, all facts, proves they must have come from him. At first he denied the whole interview and then he admits that all the interview was a fact. He admitted expressly that he made statements that would have required 15 minutes. He said he wrote letters to his wife leaving a journal of his trip West. Where are those letters? Were they lost? Why were not they put into the tin box?

In that interview he reiterated the ice house scandal. Then this man, who wanted to bite the tongue out of his mouth, waited three days before he offered to apologize for that letter. He heard John Conrad was coming. That is why he wanted to apologize.

Now, gentlemen, we come to the close. He wrote this letter and went to the Barnaby mansion. Dr. Graves said he couldn't make the bell ring. Mr. Conrad was there waiting for him. The bell rang for everybody else. Why wouldn't it ring for him? A great deal of fault has been found about Mr. Conrad's action. Suppose your mother, a wife's mother, had been foully killed. Would you hesitate about misrepresentations that the most heinous murderer of the age might be brought to justice? The wonder is that he didn't strangle this defendant to death. Suppose he did pass a man off as his brother? Are you going to clear the foulest murderer because the facts are obtained by misrepresentation? They were not employed that an innocent life may be taken, but that the innocent may be protected.

Mr. Conrad wanted to tell why he cultivated this man. The defense wouldn't let him; so they went ahead and supplied motive to suit themselves. I wanted to show the motives, but it was shut out. Of course they treated him cour-

teously. They had to do so. At the interview on Saturday night the suggestion was made that there was probably a mistake. Mr. Conrad still cultivated the accused, believing he could tell who committed the crime. Mr. Conrad looked over the securities. A great deal has been said here about a millionaire. It has always been the custom to malign the prosecuting witness when one comes forward to see that the laws are obeyed.

The State of Colorado can never repay the debt of gratitude it owes to John Conrad for maintaining the dignity of the State. On Monday night the agreement is made to go to Boston. A statement is published. They say Mr. Hanscom is not entitled to belief, because he is a detective. They are not in a position to talk. We did not produce such a contemptible specimen as McHenry. Graves contradicted him flatly on the stand and proved him a liar.

On Tuesday Mr. Hanscom says there was loud talking. He heard Mr. Conrad say he would "follow you as long as he lived and teach his boy to do so." Graves did not admit that night that he sent a bottle of pure whiskey. He enjoined secrecy—absolute secrecy. He would not tell the supposed brother even.

Graves was going to pile up scandal. Then it was that Mr. Conrad broke down and made the threat to follow the murderer. Finally Dr. Graves confessed to having sent a bottle to Mrs. Barnaby. Wednesday night there was no meeting. Thursday night he said he would let them know, if he went before the grand jury. The best evidence of all this is that he did notify them. Do you believe John Conrad lied because he was belittled by counsel? If so, then it will be useless to attempt to convict criminals in Colorado. If there is a single question in the mind of any as to Mr. Conrad's testimony, I'll be glad to set it at rest.

Now, gentlemen, Mrs. Worrell has told you that at Arrowhead, March 20, she wrote to Dr. Graves when they would arrive in Denver. Now, you will find that this man urged all along that he be kept informed as to their changing ad-

dress in his letter of February 20. In this letter he urges them to let him know their address. Why, it was necessary to keep him advised, if anyone in the world were advised, so they could get money enough to live on. Graves admitted to Mr. Lincoln that he knew that Mrs. Barnaby would be in Denver. Then he tried to justify himself by stating that others knew her Denver address. The letter was sent but for one purpose, to manufacture evidence.

Gentlemen, that disposes of all the matters I have time to discuss. I think you carry a clear remembrance of all the testimony. If you desire to be enlightened on anything, make the request and I will read to you from the notes.

This has been a wearisome trial to all connected with it. It is wonderful you have stood up so well and been able to pay such close attention, and I thank you for it. I can't impress on you half the feeling I experience of the importance of this case to your friends, neighbors and the community.

Gentlemen, I desire you to remember that this accused boasted that this State was "too poor to prosecute him." Then, remember the story of this old lady's decease, when she turned her face to the mountains and died. As she looked upon those mountains, she died in the belief that the murderer would be brought to a speedy justice. When you retire to consider this case, I hope you will teach a lesson how the laws in this State can be enforced. I hope this case will go to your children as an indication to them that the dignity of this State has been maintained.

THE VERDICT AND SENTENCE.

January 2, 1892.

At 6:30 p. m. the jury retired and at 7:35 returned into court.¹

¹ The jury had arrived at their verdict after a deliberation of an hour and a half. Two-thirds of the time had been consumed in reading the instructions of the Court and comparing the inscription on the bottle with the writing in Graves' letters. The first ballot stood 11 to 1 for conviction in the first degree, the second the same, and the third was unanimous.

JUDGE RISING. Gentlemen of the jury, have you arrived upon your verdict?

Mr. Lower. We have, your Honor (handing a white sealed envelope to the clerk).

Clerk Cobbey. Gentlemen of the jury, listen to your verdict: We, the jurors, find the defendant, T. Thatcher Graves, guilty of murder in the first degree.

January 7, 1892.

Mr. Furman presented motions for arrest of judgment to set aside the verdict and for a new trial which were argued by counsel on both sides on January 9th.

January 11.

The motions for a new trial were overruled today by the Court.

Dr. Graves was ordered to stand up to receive sentence.

JUDGE RISING. Have you anything to say why sentence should not be passed upon you?

Dr. Graves. Your Honor, I did not, in any manner, thought or deed, have anything to do with the death of Mrs. Barnaby. I never confessed that I sent that bottle, because I never sent it.

Mr. Furman. You may proceed your Honor, that is all we have to say.

JUDGE RISING. You have been found guilty of the murder of Mrs. Barnaby. Your counsel, in asking for a new trial, has not claimed that the jury, in rendering its verdict, had been influenced otherwise than by justice. The verdict has been made the subject of some criticism. I watched the witnesses closely, and in my opinion the verdict was fully warranted by the evidence. I am glad to know that if any error has been committed by this court in its rulings it will be corrected during the full consideration which the rights of the prisoner will receive from the Supreme Court. I now remand you over to the custody of the Sheriff of Arapahoe county, who shall within 24 hours after receiving these instructions cause you to be taken to the State Penitentiary at Canon City and handed over to the Warden, and on some day at some hour to be designated by that official in the week commencing on the 31st of January, you shall be taken to the proper place within the walls of the penitentiary and shall be hanged by the neck until you shall be dead.

THE CONFESSION—A NEW TRIAL GRANTED.

Deputy Sheriffs George Means and James Wilson were ordered by the Court to take the prisoner to the county jail. They left the courthouse together, stopping on the way at a saloon to give the Doctor a glass of whiskey. In a sworn statement made to the Court, Mr. Wilson said:

"I suggested getting into a carriage to go over to the jail in, but

Dr. Graves objected. 'Please let me walk,' he said, 'it may make me feel better. I shall not be alive tomorrow.' Noticing the despairing condition of the prisoner we began to ply him with questions. We found an easy subject. Graves yielded to the first inducement. I said to him: 'Now, Doctor, you have been convicted after a fair trial, and your only hope lies in making a clean breast of it, and relying on the clemency of the Government.'

"Dr. Graves at once admitted his guilt but said it all came from the advice given him by his lawyer, Ballou, concerning his business relations with Mrs. Barnaby. He also blamed his lawyers for not permitting him to tell the truth about the whiskey—viz.: that he did send the bottle, but that it was good whiskey. When I asked him if he hoped for a new trial, he said: 'I will never live to have a new trial.'"

The verdict was appealed to the Supreme Court where a new trial was ordered on a technical point—an error in the instruction of the Court.²

THE PRISONER COMMITS SUICIDE.

A short time after the reversal of the verdict, District Attorney Stevens found in his mail one morning the following letter:

"Canton, Mass., May 15, 1893.

"Mr. Stevens: Dear Sir—Whether what I am about to write amounts to anything or not, I do not know. It may be only a very remarkable coincidence and it may be more. One Sunday afternoon, during the month of November, 1890, I was sitting in the smoking room of the Park Square Station of the Old Colony Railroad, Boston, when a man came up to me and asked me if I could write. Telling him yes, a little bit, he said if I would write a note for him he would give me a quarter. I consented, but did not want the quarter, which he made me take after writing the note. What I wrote was exactly the same, word for word, as what was sent with the bottle of whiskey to Mrs. Barnaby. It was written on a block of white paper, I should say about 2 1/2 or 3 by 6 inches, which he took from his pocket, and I wrote it with a lead pencil.

"Whether I should recognize the man again or not I do not know, but I have a good idea of how he looked. I mentioned the occurrence when I got home that afternoon, but as I never read up the case I never heard of a similar note being sent with that bottle until a member of the family asked me if I remembered it, and asked me to repeat it, which I did. That was a month or six weeks ago. Now I am not looking for a trip to Denver or anything of the kind, but I thought I would write and tell you about it and then I would feel satisfied that I had done all that was necessary, for the present at least. I am willing to make an affidavit of this or do anything you say, and whether this information is of any use to you or not, I will be pleased to hear from you in regard to it. I remain, very truly yours,

Joseph M. Breslyn."

² See 18 Colo. Reports, 170.

Immediately upon receipt of this letter Mr. Stevens had the Denver postmaster wire the postmaster at Canton, Mass. (which is half way between Providence and Boston) as to the standing and character, etc., of Joseph M. Breslyn. The information was received that he was a young man of excellent standing and worked in the Rising Sun Stove Polish Works.

Mr. Stevens went East shortly after this to arrange for the return of the witnesses for the new trial of the case, and had a talk with young Mr. Breslyn at Canton, who went with him to Boston and showed him where the whole matter had taken place, and he corroborated his statement of his having been in Boston at the theatre the night before, and finding that the play which he said he had attended was at that particular theatre on that particular night, and his roommate stated that on Sunday night when this message had been written, Mr. Breslyn had repeated the entire affair to him as being a strange one on his return home, and when he saw the facsimile in the newspaper he recognized Breslyn's writing.

Mr. Breslyn also stated that he had not followed the trial in detail, but that when the Supreme Court of Colorado reversed the case, a fac-simile of the inscription on the bottle fell into the hands of his roommate to whom he had told this story, and thus his attention was called to it.

On September 1st the report of this new evidence and also the fact that the County Commissioners had that day appropriated the sum of three thousand dollars to pay the expenses of all the eastern witnesses at the coming new trial appeared in the Denver newspapers.

On the morning of September 3d, Dr. Graves was discovered dead in his cell in the Denver jail, having committed suicide by poison. Letters to the Coroner, to the public, to the County Commissioners and to his wife were found in his satchel near his bed. The letter to the Coroner was in these words:

"To the Coroner of Denver:

"Dear Sir—Please don't hold any autopsy on my remains. The cause of death may be rendered as follows: Died of persecution; worn out; exhausted. Yours respectfully,

"T. Thatcher Graves, M. D."

In the letter to the public he denied his guilt, but said he could not fight the power of the State which was determined to hang him; in the letter to his wife, he said: "I want to be preparing for that course which I have fully determined upon if Stevens gets the money from the County Commissioners."

THE TRIAL OF ABNER KNEELAND FOR BLASPHEMY, BOSTON, MASSA- CHUSETTS, 1835.

THE NARRATIVE.

Abner Kneeland^a was the publisher and editor of a Boston newspaper called "The Investigator." In certain numbers of that paper he printed: 1st, an extract from a New York journal which denied in very coarse language the Immaculate Conception; 2nd, an article from another paper which ridiculed the subject of prayer; and 3rd, an article written by himself in which was this statement: "Universalists believe in a God which I do not; but believe that their God with all his moral attributes aside from nature itself is nothing more than a mere chimera of their own imagination." A statute of Massachusetts first passed in 1782 enacts: "If any person shall wilfully blaspheme the holy name of God by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world or by cursing or reproaching Jesus Chirst or the Holy Ghost or by cursing or contumeliously reproaching the holy word of God" he shall be punished by imprisonment.

Kneeland was indicted under this statute. He was tried four times, first in the City Court where the jury found him guilty; then in the Supreme Court to which he appealed and where there were two mistrials, as one juror refused to concur in a conviction, and a fourth time in the Supreme Court where he was found guilty and sentenced to jail.

In the first trials he denied his responsibility for the reprinted articles on the ground that he was out of the city

^aKNEELAND, ABNER. Born in Gardner, Mass., in 1774 and died in Philadelphia. He was a clergyman and journalist, and author of *The Deist, Universal Benevolence, Universal Salvation and Review of Evidences of Christianity*.

at the time and they had been printed without his knowledge; so on the last trial the Commonwealth relied for their case upon the article which he himself wrote and the responsibility for which he could not deny. But to all the charges his main defense was that the statute was unconstitutional because in conflict with two sections of the Bill of Rights, the 2nd which asserts that no person shall be hurt, molested or restrained in his person, liberty or estate "for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship" and the 16th which declares: "The liberty of the press is essential to the security of freedom in a state; it ought not therefore to be restrained in this Commonwealth." Judge Wilde who presided on the last trial told the jury that the passage quoted above amounted in his opinion to the denial of the existence of any God, but that, if from the whole publication they thought that such was not the meaning of the writer, they should find him not guilty; that the wilful denial of the existence of any God was a violation of the statute and that the statute was constitutional and not contrary to the Bill of Rights. And his ruling was afterwards affirmed by the full court, the great Chief Justice, Lemuel Shaw, delivering the judgment.

THE TRIALS.¹

In the Municipal Court of Boston, and the Supreme Judicial Court of Massachusetts, Boston, 1834-1835.

HON. PETER O. THACHER, ²	} Judges.
HON. SAMUEL PUTNAM, ³	
HON. SAMUEL WILDE, ⁴	

January 21, 1834.

The indictment in this case against Abner Kneeland was

¹ **Bibliography.* "Report of the Arguments of the Attorney of the Commonwealth, at the Trials of Abner Kneeland, for Blasphemy, in the Municipal and Supreme Courts, in Boston, January and May, 1834. (Collected and published at the request of some Christians of various denominations.) Printed by Beals, Homer & Co. No. 34 Congress Street. 1834."

under the act of 1782 C. 8., re-enacted in the Revised Statutes, which is as follows :

That if any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world, or by cursing or reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching the holy word of God, that is, the canonical scriptures as contained in the books of the Old and New Testaments, or by exposing them or any part of them, to contempt and ridicule," he shall be punished, etc., etc.

The indictment charged that the defendant, on the 20th day of December, 1833, printed and published in a newspaper called the "Boston Investigator," of which he was the editor, a blasphemous and profane article, printed in the "Free Inquirer," a newspaper published in the city of New York, and copied into the Investigator, concerning the Immaculate Conception. Also another article copied from the same newspaper, ridiculing the common forms of prayer.^{4a} Also a

* "A Review of the Prosecution against Abner Kneeland, for Blasphemy. By a Cosmopolite. Boston. 1835."

* "A Speech delivered before the Municipal Court of the City of Boston, in defense of Abner Kneeland, on an Indictment for Blasphemy. January Term, 1834. By Andrew Dunlap. Boston: Printed for the Publisher. 1834."

* "An introduction to the Defense of Abner Kneeland, charged with Blasphemy, before the Municipal Court, in Boston, Mass., at the January Term, in 1834. By Abner Kneeland, the Defendant, Boston. Printed for the Publisher, 1834."

* "Speech of Abner Kneeland, delivered before the Supreme Court of the City of Boston, in his own Defense, on an Indictment for Blasphemy. November Term, 1834. Printed and Published by J. Q. Adams, No. 14 Devonshire St., Boston, 1834."

* Thacher's Criminal Cases. See 2 Am. St. Tr. 858.

² See 2 Am. St. Tr. 859.

³ See 1 Am. St. Tr. 108.

⁴ See 4 Am. St. Tr. 99.

^{4a} This article was as follows: "I cannot pass over this subject of prayer without adverting to the curious and strange predicament that God is placed in by listening to the unceasing and endless varying, and what is worse, contradictory petitions that are every moment ascending up, or down to him. I think he is more a subject of pity than General Jackson was during his late visit, his bowing and shaking was very arduous, but it was all one way congratulatory and pleasing, and he had some occasional respite; but only think of

third article, consisting of a part of a letter from the defendant published in the newspaper; which was as follows:

"1. Universalists believe in a god which I do not; but believe that their god, with all his moral attributes, (aside from nature itself,) is nothing more than a chimera of their own imagination. 2. Universalists believe in Christ, which I do not; but believe that the whole story concerning him is as much a fable and fiction, as that of the god Prometheus, the tragedy of whose death is said to have been acted on the stage in the theatre of Athens, five hundred years before the Christian era. 3. Universalists believe in miracles, which I do not; but believe that every pretension to them can either be accounted for on natural principles or else is to be attributed to mere trick and imposture. 4. Universalists believe in the resurrection of the dead, immortality and eternal life, which I do not; but believe that all life is material, that death is an eternal extinction of life to the individual who possesses it and that no individual life ever was or ever will be eternal."

The prisoner pleaded *not guilty* and the trial began today in the Municipal Court before JUDGE THACHER and the

God having no respite whatever, day or night. Only think of it Mr. Strong, here you are yourself, teasing God regularly seven times a day at least, if you are a real Simon Pure; I take it for granted that you pray when you get out of bed, alone; then with your family, again at every meal once or twice, and again family prayer in the evening, and again by yourself on retiring to bed. And if every professor of religion in the United States, prays as often, which he ought to do, what a heterogenous mass of contrariety he has to hear and answer every day, for a few millions. But this is not all. Look at the occasional prayers of the clergy and others, at marriages, christenings, sick beds, funerals, etc., etc., and even on the occasion which elicited this famous tract.

"But when we add public prayer to the catalogue who can measure its length? Only think of the prayers that are offered up every Lord's day in this country, besides those on other occasions, such as weekly prayer meetings, social do., anxious do., inquiry do., missionary do., four days and protracted do., etc., etc., etc., and what kind of an ear and memory can you conceive God must have? But this is not all; think of their contradictory character; one is asking for one thing, another for another; one for rain, another for dry weather; one for an east wind, another for a west wind; one sect is for predestination, another for free will; one for sprinkling, another for immersion; one for a trinity, another for a unity; one for the salvation of the elect, another for the salvation of all men, etc., etc.

"Now, can any one conceive, how all these prayers can be either heard or answered by one person? And this difficulty is greatly en-

following jurymen: Edward Holbrook, Abel Babcock, James Brown, Jacob Denton, Wm. Dyer, Philip Eliot, Luther Felton, Reuben Frost, Nathaniel Hammond, Jonathan Holbrook, Thomas Holland, Wm. Holmes.

S. D. Parker,⁵ for the Commonwealth.

Andrew Dunlap,⁶ for the Prisoner.

THE EVIDENCE.

The Foreman of the printing office of the *Investigator* testified to the publication in that newspaper of the three alleged libelous publications. On cross-examination he said that while Mr. Kneeland was absent from the city, a clerk in his office took the

Free Inquirer from the Post Office and had the extracts named in the indictment printed in the *Investigator*.

The prisoner called no witnesses except several to testify to his good moral character.

hanced from the consideration that these prayers are not all to be answered immediately; many of them are offered prospectively to be answered, like prophecy, at some future time.

"It therefore appears to me, that God must have an ear very different from anything I can conceive of, to hear so many contradictory prayers all at once; and I am equally at a loss to imagine how he could recollect them all, and at what time they are apt to be answered.

"Perhaps he keeps a set of books, and clerks, to enter all the prayers in; but another difficulty presents itself. How could he inform all these clerks at one time what to enter? Besides, when would he find time to examine those books, so as to answer all the petitions at the proper time?

"I have thus far confined my remarks on prayers to this country, which contains only about thirteen millions; but how are my wonder and difficulties increased, when I extend my views to the eight hundred millions on this globe, a large portion of whom are continually offering up prayers of some kind or other to this great being. I now in sober reality ask, what conception can any one form of a being capable of either hearing, remembering and answering, such an innumerable mass of contradictory petitions, continually pouring in from all quarters? Only think of it seriously for one minute, and then say whether you think it possible that there is such a 'prayer hearing and prayer answering God,' as I have portrayed? Superstition may answer in the affirmative; philosophy will answer in the negative."

⁵ See 6 Am. St. Tr. 672.

⁶ See 10 Am. St. Tr. 702.

MR. PARKER'S OPENING.

Mr. Parker: You have perceived, Gentlemen, that the offense charged in this indictment against the defendant is alleged to be in violation of a statute law of this Commonwealth in such case made and provided.

Besides being a statute offense, what is set forth in the indictment, is also an offense at common law. Both the statute and the common law will therefore be subjects for your consideration, because if in your opinion, after a full hearing of the case, you should not think it a statute offense, you have a right to return a verdict as upon an offense at common law, which is a part of the law of this land, and recognized as such both in the Constitution of the Commonwealth, and in that also of the United States. My course then will be to present to your notice on this occasion: (1) The statute law relating to this offense; (2) The common law; (3) The importance and paramount duty of enforcing these laws, and punishing all violations of them; (4) The testimony on which the prosecution is founded, and by which the guilt of the defendant will be made manifest.

Gentlemen, this is not the time or place for me to discuss, and pronounce an eulogium upon the merits or evidence of religion in general, or of christianity in particular, the wisest, best, and most fully evidenced of all religions the world ever knew; the religion of the men of the most enlarged, acute, patient, scrutinizing, and capacious intellects the world has ever seen, philosophers, scholars, judges, poets, moralists, and statesmen.

We have a positive, definite statute law, which it is our duty to enforce. It was passed on the 3rd of July, 1782, and is entitled "an Act against Blasphemy."

It is possible that the meaning of some words may be questioned. Their signification will therefore be taken from the best sources. Dr. Webster, in his Dictionary says, To blaspheme is to utter blasphemy,—to speak of the Supreme

Being in terms of impious irreverence—to speak evil of—to utter abuse or calumny of.—Blasphemy, he says, is an indignity offered to God by words or writing; that which derogates from the prerogatives of God. In another book, (Hume on Crimes,) it is stated that blasphemy consists in the denial of the being, attributes, or nature of, or uttering impious or profane things against God, or the authority of the Holy Scriptures. It is committed by uttering such things in a scoffing and railing manner, etc. The word wilfully in law means intentionally—done on purpose—not accidentally—or unconsciously. But the statute itself, on which this prosecution is founded, undertakes to define what amounts to blasphemy. I consider this statute, being in full force and unrepealed, as establishing as a part of the law of this commonwealth, these propositions. 1. That there is a God whose name it is possible to blaspheme. 2. That denying or contumeliously reproaching God is wilfully blaspheming his holy name. 3. That denying his creation, government, or final judging of the world is blaspheming his holy name. 4. That reproaching Jesus Christ, is blaspheming the holy name of God. 5. That reproaching the Holy Ghost, is blaspheming the holy name of God. 6. That reproaching the Holy Scriptures, is blaspheming the holy name of God. 7. That exposing the Holy Scriptures or any part of them, to contempt and ridicule, is blaspheming the holy name of God. There is but one crime stated—one *corpus delicti*—that is, wilfully blaspheming the holy name of God—that is the only thing prohibited by the statute.

As the constitutionality of the law is to be called in question, the propositions I maintain, are, that the law is constitutional, and that the Christian religion, at the time of the adoption of the constitution, was part and parcel of the constitution itself: and without faith in the Christian religion, this commonwealth could have had no government prior to the year 1820, and no lawful conventions in that year to amend the constitution. These propositions I shall prove from the constitution itself. 1. In the preamble—It recognizes God as the great legislator of the universe, and acknowledges his

superintending providence, and prays for his direction.

2. Next—The second article in the bill of rights declares it to be the right and duty of all men in society, publicly and at stated seasons to worship the Supreme Being, the great creator and preserver of the universe; who is called God in the same article.

3. The third article provides for the worship of God, and requires parishes to make provision for the public worship of God, and the support of public teachers of religion, and provides that every denomination of Christians shall be under the protection of the law.

4. The eighteenth article speaks of the necessity of piety, and observance of it in making laws. Piety here means religion, and this article strongly proves the constitutionality of the law and the right of the legislature to make it.

5. In part the second, ch. 1, sec. 1, art. 3, at the close—courts have full power to administer oaths to witnesses. The object of an oath is to search the conscience, to make an appeal to God and his justice for the truth of what the witness says.

6. In ch. 2, sec. 1, art. 2—No person shall be eligible as governor of this commonwealth, unless he shall declare himself to be of the Christian religion; that is, the religion of Jesus Christ. This article clearly incorporates the Christian religion into the constitution.

7. Chap. 2, sec. 2, art. 1.—The lieutenant governor shall be qualified in point of religion as the governor.

8. Ch. 5, sec. 1, art. 1.—The honor of God, the advantage of the Christian religion is provided for, by encouraging arts, sciences, and literature, and the ministers of congregational churches are made officers of the university.

9. Ch. 6, art. 1.—The governor, lieutenant governor, all counsellors, senators, and representatives, as a condition precedent to entering on office, shall declare that they believe in the Christian religion. Here the whole legislative power must have this faith and avow it publicly in presence of many witnesses. How could a religion be more incorporated and become part of a constitution? Such was the constitution when this law was made. In 1820, the constitution was altered by a convention, but that convention could not have been called but by the act of a Christian general court. That

convention derived its authority solely from Christians. Without Christians there could be no general court prior to the convention, and without a general court there could have been no convention. [See c. 5, art. 10, providing for calling a convention.] The constitution itself, the paramount law of the land, establishes the Christian religion, makes it a part of itself, and maintains the positions I have stated—each and every one of them. But there is another important article in the constitution which bears on this point. In the sixth chapter, on oaths, etc., art. 6, it is stated all the laws which have heretofore been adopted, used, and approved in the province, or State of Massachusetts, shall still remain and be in force until altered or repealed by the legislature, etc. The makers of the constitution must be presumed to have known the existing laws. There were existing laws in relation to religion when the constitution was adopted, and that constitution must therefore have reference to them. That constitution providing that all the laws which had been adopted, used, and approved in the province, colony, or state, of Massachusetts Bay, and usually practised on in courts of law, shall remain in force, until altered by the legislature, in fact confirms and re-enacts those previous existing laws. Similar laws then are constitutional. Let us then go back and see how the law against blasphemy stood in the province, colony, and state; because the framers of the constitution must be presumed to have reference to them. (Col. Laws, 58, 61, 302.) The principle of the laws has been the same from the beginning, but the modes of punishment have varied as to this as well as to other crimes; in the course of time, all punishments have been ameliorated. The colony laws against atheism and blasphemy, remained until the revolution. Then the constitution was proposed, discussed most ably and thoroughly, and adopted. Then the new act was passed, on which this indictment is founded, within a very short time after the adoption of the constitution, and passed, too, probably by the very men, or many of them, who made the constitution itself, and has been in operation ever since, never obsolete, never repealed or modified. But the common

law, also, is retained by the constitution—having been adopted, used and practised upon in our courts, and must, therefore, also be presumed to have been referred to by those wise men who drafted, and those who adopted the constitution; and this common law is still the law of the land as to crimes and civil suits, except so far as altered by the legislature. Also, the constitution of the United States recognizes the common law as part of the law of the land, in article seventh of amendments. But if this case fall not under the statute, then, such an obscene and blasphemous libel is an offense of the common law, (Starkie on Slander, 499,) and punishable as such in this court as much as murder, assaults, perjury, and other crimes at common law; and this common law is made constitutional by the constitution itself.

I will proceed now to consider what the common law is in relation to this subject. The general principle is, that the law will restrain and punish all open and public attacks upon religion, upon the authority of the scriptures, and upon the founder of Christianity, because the belief in religion, so construed, constitutes the only binding obligation among men, and its denial tends to the subversion of all law and order in society.⁷ Blasphemy is not only an offense against God and religion, but a crime against the laws, state, and government, and therefore punishable by indictment; for to say religion is a cheat, is to dissolve all those obligations whereby civil society is preserved; and to reproach the Christian religion is to speak in subversion of the law.⁸ This was said by Lord Chief Justice Hale, than whom, it has often been said, that a wiser man, a better lawyer, and one who had a greater respect for the rights and liberties of the subject, Great Britain never produced. Sir Philip York, afterwards Lord Hardwicke, said in Curl's case,⁹ "every publication which reflects upon religion, that great basis of civil government and society, is indictable." Serjeant

⁷ 3 Merivale's R. 390.

⁸ Taylor's case, 1 Ventris 293; 3 Keble 607.

⁹ Strange 788

Hawkins¹⁰ enumerates five species of offenses against God, at the common law, embracing some of the very modes of blasphemy described in our statute law. Lord Raymond declared in Woolston's case,¹¹ "Christianity, in general, is part of the common law, and therefore to be protected by it. Whatever strikes at the very root of Christianity, tends manifestly to the dissolution of the civil government." The same doctrine is expressed in the case of the King v. Curl.¹² Lord Mansfield said, (2 Burn's *Eccles. Law*, 218,) "for atheism, blasphemy, and reviling the Christian religion, persons have been prosecuted and punished upon the common law." His successor, Lord Kenyon, in Williams' case,¹³ confirmed the like doctrine. Lord Ellenborough, in the case of the King v. Eaton,¹⁴ expressed the same opinion. Chief Justice Abbott, in Waddington's case,¹⁵ was of the same opinion, as also were justices Bayley, Holroyd, and Best. Best, J. used this language; "a work containing such arguments, is, by the common law, a libel, and the legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered as the basis of that law." The like opinions were expressed again by the last mentioned justices in Carlisle's case.¹⁶ Lord Chancellor Eldon is equally clear upon the same subject. In Pearson's case,¹⁷ he said, "prior to the statute, blasphemy was an offense punishable at the common law." The same opinions are maintained in treatises upon libel and slander.¹⁸ Obscene libels are also indictable offenses at common law.¹⁹

In the year 1820, the constitution was revised by a convention chosen by the people of the state for that purpose.

¹⁰ Pleas of the Crown, c. 5.

¹¹ Str. 834; Fitzgibbon 64.

¹² 17 How. St. Tr. 154.

¹³ 26 How. St. Tr. 653.

¹⁴ 31 How. St. Tr. 927.

¹⁵ 1 Barn. & Cres. 26.

¹⁶ 3 Barn. & Ald. 161.

¹⁷ 3 Meriv. 407.

¹⁸ Holt's Law of Libel 64, 70; Starkie on Slander 487, 493.

¹⁹ Holt's Law of Libel 72; 2 Strange 790, 792; Wilke's case, 4 Burr. 2530.

No alteration was made in any particular, but in the form of certain oaths.

This is not repealing the Christian religion; this is not extirpating from the constitution, nor in anywise invalidating its obligations. It merely regulates the form of the oath of office, substituting a shorter form in lieu of two others. And this is clear, because not a single statute law has been altered or modified, abrogated or repealed, in consequence of those amendments, by any one of twelve successive legislatures, who have been fond enough of altering the laws in other respects, perhaps too forward to change the laws of the land. The statute against blasphemy still remains, and still is in full force. And this amendment of the constitution, if so it must be called, can in nowise benefit the case of this defendant, because in the new constitution, or rather the new enactment of the constitution, the second article in the bill of rights, still inculcates the duty of worshipping God, and, also, because in the very new forms of oath, the constitution asserts the existence and attributes of that God.

The constitution in its original form and in its amendment still lays the foundation of all security and safety in Government upon the solid rock of a belief in the existence and attributes of God, and thus makes it manifest how great a crime against Government and the Constitution it is, to deprive the community of the safety, security, integrity, and fidelity, derived from this conscientious appeal to God, the searcher of all hearts, from whom no secrets are hid, by all witnesses and officers who undertake to discharge any public duty. How extensive and immense the injury to the public welfare would be, if this restraint, this hold on men's consciences and creed were removed or even ridiculed, must be apparent to every one, who considers that up to this hour no person holding a civil, military, judicial, executive, state, county, town, parish, or other public office can enter upon, or perform any act of any one of said offices, before they have made formally, solemnly, sincerely, and conscientiously this direct and awful appeal to the omnipotent, omniscient, and all perfect judge of the living and the dead.—

My learned friend, who is to conduct the defense in this case, whatever he may say in your hearing this day, as counsel for the prisoner, has repeatedly as a man and as a public functionary, made that solemn appeal to God, as attorney of the Court of Common Pleas, as a counsellor at law, in the Supreme Court, as a representative of this city in the Legislature, and in other high and honorable offices which his patriotism has induced him to accept for the good of the people.—I hope he will not prove himself recreant from that oath this day. The honorable Judge who presides in this court, the clerk who keeps its records, the sheriff who obeys its commands, the constable who are its inferior agents, the witnesses who testify before it; you yourselves who sit as jurors in those seats to administer justice between party and party, between the Commonwealth and the prisoner, all of us have laid the foundation of our duty in that solemn and awful appeal to God that he will reward or punish us hereafter, as we do right or wrong in our office. The crime of this defendant is his open, indecent and wilfull, public attempt to deprive the community of this solemn security, by ridiculing and denying that God. And who will say this is no crime?

There have been other infidels—Hume, Gibbon, Voltaire, Volney, etc., but the works of those persons were read only by men of literary habits—necessarily a few—and to men of sound understanding they carried their antidote with them. But here is a journal, a newspaper, cheap—and sent into a thousand families, etc. Where one man would be injured by Hume, Gibbon, or Volney, a thousand may be injured by this newspaper so widely circulated, so easily read—so coarsely expressed—so industriously spread abroad.

It was well said of those great writers, that “their fault was to carry their idea of God to the perfection of human intellect, and then to disbelieve all revelation from heaven, which was not perfectly intelligible to that portion of intellect which they possessed. It was the vanity of man against the omnipotence and omniscience of God.”²⁰ Now

²⁰ 31 How. St. Tr. 958. Rex v. Eaton.

the reverse of this is the case here. God is either blotted out of existence, or most indecently and with unbecoming levity called an Old Gentleman, and a most irreverent comparison made between him and President Jackson.

I will not repeat or comment upon the most gross, scandalous, and indecent passage respecting the Saviour set out in this indictment. It is too shocking to all Christians, too obscene and too revolting to decency, to be discussed here.

If the Christian religion has civilized, improved, and blessed every nation where it has flourished—

If the manners and morals of Christian communities are better in every respect than those of savages, idolators, and other infidels, and heathen of ancient or modern times—

If a sincere Christian is a better man in all respects, than men who live without God in the world—

If the Christian religion affords hope and consolation to the afflicted, the poor, the sick, and the dying—

If it be the source to millions of people, of present happiness, and of hopes of future joy—

If it supports the laws of the land, gives its sanction to judicial proceedings, is a surety for truth, and fidelity, and honest discharge of official duty—

If it be a part of the law of the land, promulgated, and established in numerous passages in the constitution, declared and supported by the statute law of the commonwealth, recognized and incorporated by the common law, into its own body as part and parcel thereof, and so declared by the wisest and most learned judges and lawyers—

If for centuries it has withstood the assaults of open enemies, and the treachery of false friends—

If, to say nothing of the ten thousand talented Clergymen, who have demonstrated its copious proofs to the world, and whose works have been the satisfaction, delight, and admiration of all ages—

If it has met the approbation and honest conviction of the brightest and wisest among laymen, of the most sagacious, shrewd, learned, and diligent minds, who applied all their

intellectual faculties to test its truth and excellence—the almost super-human Newton, the philosophic Boyle, the great metaphysician Locke, the acute Sir Matthew Hale, the noble minded Milton, the elegant Addison, the great moralist Dr. Johnson, the accomplished and learned Sir Wm. Jones, our own Washington, Parsons, and many others too numerous to mention of the greatest and wisest philosophers, scholars, and gifted men—

“If you find all that is great or wise, or splendid or illustrious among created beings; all the minds gifted beyond ordinary nature, (if not inspired by its universal author for the advancement and dignity of the world,) though divided by distant ages and by clashing opinions, yet joining as it were in one sublime chorus to celebrate the truths of christianity, laying upon its holy altars the never fading offerings of their immortal wisdom—”²¹

If one hundred millions of men believe this religion to be holy and true, and the truth is daily spreading wider and wider—if all these things be so, I think for itself it need not fear the attacks of Robert Owen, Fanny Wright, or Abner Kneeland, or any of their conceited disciples, wise in an extravagant degree in their own conceits, inflamed and swelling on the dregs of infidelity. left them by a tribe of miserable predecessors, in which there is nothing new, nothing that has not been a thousand times refuted; I say for itself Christianity has nothing to fear from such vulgar attacks and indecent ridicule. It has been assailed by wicked men for centuries, and yet has kept a uniform, steady, forward progress, for ages, and at the present day all other religions are bowing before it—Mahometism in Europe and Asia—idolatry in India and the Pacific Ocean—cannibalism in Africa, and every species of false religion in all parts of the world. Christianity has withstood the attacks of Julian, and other apostates, of the infidels of the early ages—the force of all the political power and intellectual efforts of the Roman Empire, the mistress of the world—the more modern

²¹ Erskine in Williams' Trial. 26 St. Tr. 668.

attacks of Hobbs, Tindal, Voltaire, Rousseau, Hume, Gibbon, the Republic of Revolutionary France, Tom Paine, and every other enemy who has attacked it. It has kept an onward and dignified march in the progress of ages, disregarding the puny attacks of man, covering the earth as the waters do the sea. The prophecy that the gates of hell shall not prevail against it, like that living and still extant miracle, the dispersion of the Jews, is in constant development; and our religion, I call it ours with pride, pleasure and gratitude, has never been more extensive, active, and flourishing in all parts of the world than it is at the present moment.

Christianity thus flourishing, thus based on the rock of ages, thus approved and cherished by the greatest, wisest, and best of men, wants no protection from the law against the hostility of Abner Kneeland, the conceited, the poor and weak mortal now on trial at the bar of this Court; there is nothing great, or powerful, or new in the compass of his ordinary, and self-deluded, self-blinded intellect, that can prevail against Christianity in any fair or intelligent minds, who have leisure and learning enough to understand the subject, nothing that has not been refuted in the ablest and clearest manner. He is not prosecuted on that account. He may reason candidly, and fairly, and decently as much as he pleases—the law prohibits not that—but it does forbid public blasphemy.

I am now to proceed to the testimony in this case. This is very short and concise. I shall call but a single witness. He will prove the publication of this obscene and blasphemous libel by the defendant. This proved, the libel itself will prove its own blasphemy and infamy. Not a single innuendo is necessary to be placed on this record to explain the meaning of the libel. I regret the necessity I shall be under, of shocking your feelings by reading it in your hearing to prove that it is correctly stated in the indictment. Nothing but official duty should oblige me to read it aloud anywhere. Before I call the witness, not knowing what may appear in evidence on the part of the defendant, I must beg leave to call your

attention to two more principles of law which may have a bearing on the case.

The copying of a libel is *prima facie* evidence of publication, this extends to republication of another's composition. Hawkins' P. C. vol. 2, p. 131. The proprietor and editor of a newspaper is criminally answerable for a Libel inserted without his knowledge.

When I shall have read the Libel, I will not insult your understanding by any remarks to show its blasphemy. If it contained any one passage blaspheming the holy name of God, in any one way pointed out by the statute, it would be enough to prove the defendant's guilt. But you will see it is blasphemous in all and each of those ways.

Mr. Dunlap agreed the reading of the libel might be dispensed with. He admitted it is correctly set out in the indictment.

Mr. Parker: I have now, gentlemen, laid this case before you on the part of the Government. I deem the guilt of the defendant fully demonstrated upon the law and the testimony. What kind of defense the prisoner's counsel can make, you will judge when you have heard it. Probably the society over which the prisoner presides, have furnished him with all the arguments he wants. I should have been happy to have received the assistance of anybody in this important case. Who was the cause of putting this libel into prosecution I know not. I have been left alone to discharge unaided this official duty, without communication with anybody. I rely on God, in whose service as well as in the service of the Christian people of this Commonwealth I appear today, that he will bless my humble efforts in a cause so important to a moral and religious community. I have attempted to do my duty. I pray that he may guide you, in yours, and so help you, as you are firm and faithful in the discharge of your duty this day to God and your country.

MR. DUNLAP FOR THE PRISONER.

Mr. Dunlap. Gentlemen:—There are two general grounds of defense, and they will be now plainly stated. It will be

contended that the case is not within the statute, on which the indictment is founded, and that the statute is in violation of the letter and spirit of the constitution.

The case I contend is not within the statute. I shall not repeat the first two articles, woven into the indictment, and taken not from editorial articles in the defendant's newspaper, but from communications not previously read by him, and one of which the most obnoxious, was published in his absence from the city, and for which, he is neither legally nor morally responsible. I shall not read these articles, for they are as offensive to my feelings, as to those of my learned friend, whose duty it is to conduct this prosecution, in behalf of the Government. No good can result to the defense, the jury, or this crowded auditory, from reading them. I shall therefore speak of them generally, being confident that the grounds of the defense, will not be misunderstood.

The first article complained of, which was extracted from the "Free Inquirer," printed at New York, is not a denial nor cursing, nor reproaching any person or thing, but a statement in an improper manner of the doctrine of the belief in the miraculous conception of the Virgin; and in the statute no mention is made of the Virgin. There is no direct denial of the truth of that doctrine in the article. Any one has a right to assail that doctrine by argument or satire. It has always been a subject of controversy among the different sects. The Unitarians, who hold the doctrines of Priestley and Belsham, do not believe in the miraculous conception. Those professing a belief in Christianity have used coarser and stronger language in attacking the belief of their fellow Christians. Dean Swift's "Tale of a Tub," written to insult the Roman Catholic religion, is filled with grossness and obscenity far greater than in this piece of the defendant.

This very article republished from the Free Enquirer in the Investigator, was originally published in New York, a city containing a population of near three hundred thousand persons. In that city, there are as I understand, but two Unitarian Societies, and one of these is now without a pastor. The rest of the Christians of that mighty city are Trini-

tarians.. Yet the original publisher of this article was not indicted. It was reserved for the grand jury of this Unitarian city, this citadel of liberal principles in religion to commence this prosecution, against the editor of a paper where it was merely republished. In the orthodox city of New York, they treated the ribaldry with contempt, and did not consider it necessary to sustain the cause of religion by the faggot, the gallows, the pillory, or the whipping post. I had hoped in this city, boasting of its liberal opinions in religious matters, never to have known a prosecution on a penal law relating to religion, for I believe all such laws to be unwise and unjust, and prohibited by our glorious constitution.

This is the boasted land of toleration. No, gentlemen, that is not the proper word, for who shall presume to tolerate another, when the latter has an undeniable right to enjoy and maintain his own opinions? I should have said this is the boasted land of civil and religious freedom, guaranteed by written constitutions of government so plain that he who runs may read the privileges which they secure and the rights they proclaim. Yet here in this city of Boston when we have about finished one-third of the nineteenth century we are engaged in the trial of an indictment founded on a penal statute respecting religion; a statute by which the defendant may be punished by sitting on the gallows the pillory or imprisonment for publishing a miserable ridicule of the doctrines of the miraculous conception; a coarse attack upon the modes of prayer often addressed to the Deity; a calm profession of disbelief in the belief of the Universalists, in the divinity of Jesus Christ, and in the doctrine of the resurrection. Call it what you may here, the world and posterity, will call all such prosecutions, persecutions, and instead of crushing by these means, the cause which is attacked, its strength will inevitably be increased, unless the nature of mankind shall be changed, for there never was any good yet done by the faggot, the wheel, the rack, the gallows, the pillory, the whipping post and the dungeon in religious

feuds except in the cause against which these engines of power have been employed.

This article was printed in the absence of the defendant, and without his knowledge or consent. He is civilly but not criminally responsible. The English decisions on the law of libel in favor of the crown, are entitled to but little respect here. There is no American decision recognizing the position of Lord Kenyon as cited by the county attorney. But in Almon's case, (5 Bur. 2686,) it was decided that when a book was sold in a bookseller's shop by the agents of the defendant, it was only *prima facie* evidence of a publication by the principal.

The second article I readily admit is also highly offensive to good feeling and taste. Accustomed as we are from childhood to consider such subjects, it is perhaps even more revolting to the feelings, than the first article complained of.

I cannot bring my mind to believe that the writer intended, or would dare to cast ridicule upon such a sacred subject as the Supreme Being. The intent should be carefully considered. Is it not more reasonable and charitable to suppose, that the intent of the writer was to ridicule merely strange ideas of their worship, which the person he describes as offering up absurd and contradictory prayers, must have in their minds? The object of the article, both the manner and the matter of which I condemn, is to expose to ridicule, the strange modes of prayer, which many very piously adopt. It is however very well known, that the subject of efficacy of prayer, is one, which has agitated the minds, and excited the speculations of the most devout christians. Have not volumes of theological lore been written, and a vast number of profound sermons preached upon this deep and important subject? Is it not to this day often made the theme of very able and eloquent discourses by our enlightened clergy of almost every denomination? The Book of Common Prayer I often read with delight, and never I hope without improvement, and of all splendid human performances, to my mind the most magnificent is the solemn service of the Church of England for the burial of the dead, a service which lifts the

soul of the hearer from earth to Heaven. Ask my learned friend, the counsel for the Commonwealth, who was reared in the bosom of this church, why these fine forms of prayer have been devised, and he will tell you, to guard against absurdities, too frequent in the matter and the manner of prayer by uninformed persons, and to preserve the decency of divine worship. Would not this be an admission that there were in use, modes of prayer of a highly objectionable character, and deserving remark and needing reformation, although as I cheerfully admit, not a fit subject for levity and coarse ridicule.

I have supposed that it was now an opinion, if not generally entertained, certainly believed by many devout and enlightened christians of various denominations, that the chief efficacy and advantage to be expected from prayer, is the effect which the exercise is calculated to produce on the heart of the supplicant pouring forth the aspirations of the soul to Heaven, the same effect which is sustained by silent and solemn meditation, among that useful, benevolent and pious class of christians the Quakers, whom our equally pious ancestors, persecuted with such blind and furious zeal, even to the whipping post, the pillory and the gallows, the shame and terrors of which punishments are now denounced upon the head of the defendant silvered o'er by time.

Gentlemen, it will be found that the defendant's newspaper has not been the first organ to disparage prayer. The religious Puritans disparaged, with as much scorn and contumely, the modes of prayer adopted by those from whom they differed in sentiment as the writer of this article in the Investigator, disparages the modes of prayer adopted by those from whom he differs in sentiment. In Southey's History of the Church we find that the Puritans disparaged social prayer.

"Because of the superstition connected with the mass, the Puritans falling into an opposite extreme, disparaged social prayer and thanksgiving, and attached as much importance to sermons as the Romanists to what they deemed the sacrifice of the altar. They maintained the extravagant and pernicious opinion, that the scrip-

ture had no efficacy unless it were expounded in sermons, the word no vital operation, unless it were preached from the pulpit; that prayers and sacraments, without sermons, were not merely unprofitable, but tended to further condemnation."

Our Puritan ancestors in this Commonwealth were not more mild in their denunciations of the prayers of the Church of England than were their brethren, the other side of the water, who under Oliver Cromwell shook to their foundations, the political and ecclesiastical establishments of England. Let me read to you an extract from the last will and testament, of one of the early and shining lights of the New England Churches, the celebrated Chauncey, the second President of Harvard College. It contains an attack upon the prayers of those from whom he dissented, of the most violent character. The following is an extract from the biographical article on President Chauncey contained in Peirce's History of Harvard University.

"He did not even omit it in his last will, the preamble to which contained strong expressions of self-condemnation for his "so many sinful compliances with and conformity unto vile human inventions, and will-worship and hell-bred superstition, and patcheries stitched into the service of the Lord, which the English mass-book, that is, the Book of Common Prayer, and the ordination of priests, etc., are fully fraught withal."

This ebullition of bitter feeling is not poured forth in a fugitive newspaper article; but deliberately recorded in that solemn act in which a man usually bequeathes his soul to Heaven, while he leaves his earthly prejudices to be buried with him in the grave. Yet here we find one of the most eminent divines and scholars, who have illuminated and adorned our country, a famous President of the most famous University in the new world, denouncing the forms of prayer adopted by the second church in Christendom in power and renown as a "hell bred superstition."

It is not pretended that the third article complained of contains any "contumelious reproaching of God." The offense, if there be any, consists in denying God. The words are: "Universalists believe in a god which I do not; but

believe that their god with his moral attributes, (aside from nature itself,) is nothing but a chimera of their own imagination." This is simply a disbelief in the creed of the Universalists. Were it an expression of the defendant's disbelief in the Supreme Being, it would not be a denial of God, within the meaning of the statute. The defendant expressly disavows atheism. In criminal cases, in matters of doubt, the most favorable construction is to be given. But by every rational and grammatical construction, it is apparent that the defendant intended to express no disbelief in God. There is no point after the word "God" in the first clause. The point is after the word "not," and it is a semicolon. But in the next paragraph the punctuation is different. There the words are "Universalists believe in Christ, which I do not," with a comma after the word Christ. In the latter sentence, the defendant intended generally and absolutely to express his total disbelief in the divinity of Jesus Christ. In the first paragraph he did not intend to express generally and absolutely his disbelief in God, but in "a God," that is, the "God" or belief of the Universalists.

The defendant does not say, the Universalists believe in God, which I do not. But the expression is, "Universalists believe in 'a' God which I do not." This article "a" limits the meaning as he intended it should. He intended to say merely that he did not believe in "a God," that is, the "God" or creed of the Universalists. What do the grammarians teach us, respecting the office of this article? The rule in Murray is that the article a "is used in a vague sense to point out one single thing of the kind in other respects indeterminate" The Trinitarian says Unitarians believe in "a" God which I do not. Is the Trinitarian an Atheist? Does he deny God by this expression? Surely not. So far from professing a total disbelief, he intends to express a more extensive belief than the Unitarians, to declare, that he believes in more than they do, that he believes in the Father, the Son, and the Holy Ghost, whereas Unitarians believe only in the divinity of God. Apply this rule to the sentence under consideration, and it is apparent, by the grammatical rule of

construction, that the writer intended to designate and distinguish one particular God or belief of the kind of Gods, or creeds, worshipped or cherished in the world. Again, the article "a" is sometimes used, in a definite sense, and even sometimes called the definite article "a," as will be perceived in the note to Alger's Murray, in the Cincinnati edition, 1832. When he speaks of his disbelief in Christ, he does not say "a" Christ, but simply, absolutely, unequivocally, without limit or qualification, declares that he does not believe "in Christ." He would have adopted a similar construction of the sentence, and not have used the article "a" in the paragraph respecting God, had he meant to declare simply, absolutely, unequivocally, without limit or qualification, a disbelief in God. There can be no rational ground for a doubt of the real meaning of the defendant, when the next clause of the sentence is considered. The words are: "Universalists believe in a God which I do not; but believe that their God—." This clearly shows that the words "a God," and the words "their God," are used in the same limited sense, and that the object was to define and distinguish the God or creed of the Universalists, as a particular faith, from which the writer dissented. Had his intention been otherwise, the article "a" would have been omitted in the first clause of the sentence, and the word "their" in the second, and the sentence would have been thus framed, "Universalists believe in God, which I do not, but believe that their God," etc. The defendant in adopting the expression "a God" and "their God" to designate a particular belief, is sustained not only by popular usage, but by some of the highest authorities in church and state.²²

²² *Mr. Dunlap* here read several passages from "Stuart on Religious Liberty," and from Jefferson's letter to John Adams, dated April 11, 1823, where he says: "I can never join Calvin in addressing his God. He was indeed an atheist, which I can never be; or rather his religion was dæmonism. If ever man worshiped a false God, he did. The being described in his five points, is not the God whom you and I acknowledge and adore, the Creator and benevolent Governor of the world; but a dæmon of malignant spirit."

Gentlemen, I have said the prisoner does not admit himself, to be an Atheist, and he repels the charge.

JUDGE THACHER: But what is his God? If the defendant disclaims atheism, he must believe in some God, and I should like to know, what the God is that he believes in.

Mr. Dunlap. That is an affair between him and God, not between him and your Honor. He does not consider that he is bound to make a confession of faith here, before this earthly tribunal, or that the court has a right to require of him, a disclosure of his religious opinions. He is before a common law court, and not before the Inquisition, and will not submit to interrogatories respecting his creed. He is brought here on a charge. It is sufficient for him to defend himself against that charge, without being compelled to state what is his religious belief, for which he is accountable only to God.

JUDGE THACHER. But the defendant is now before a human tribunal, and we must know what he does believe in this particular, in order to judge, whether he does or does not believe in any God.

Mr. Dunlap. I am arguing this case to the jury on a matter of fact, and here again respectfully, but solemnly protest against the jury's being influenced in any matter of fact, by the opinion of the Court. Were it otherwise the jury trial would be a mockery, and not the bulwark of the liberty of the people.

The remaining part of the article complained of, and now under examination, contains a statement of the defendant's disbelief in the miracles, and the Christian doctrine of the resurrection of the dead. An attack upon a profession of belief in the doctrines of Christianity, is not blasphemy, within the statute. The statute defines in what blasphemy shall consist. The blasphemy must be wilfully denying God, cursing or contumeliously reproaching God, his creation, government, and final judging of the world, cursing or reproaching Jesus Christ or the Holy Ghost, or cursing or contumeliously reproaching the Holy Scriptures, by exposing them or any part of them, to contempt or ridicule. Express-

ing a disbelief in the miracles and in the Christian doctrine of the resurrection, is none of these things described in the statute. It is not denying God. If the doctrine advanced, or the disbelief professed by the defendant, be contrary to the doctrines and belief contained in the Scriptures, yet there is no cursing nor contumeliously reproaching any person or thing, as is required to bring a case within the statute against blasphemy. A simple denial of God is within the statute. But in all other cases, there must be more than a denial, there must be a cursing or contumeliously reproaching of the person or things described in the law, to bring a case within the purview and operation of the statute.

It cannot be contended that because doctrines are denied, which the court and jury may believe to be contained in the Scriptures, therefore the Holy Scriptures are exposed to contempt and ridicule, and the statute against blasphemy is violated. If such a doctrine be sound, the Orthodox court and jury would be bound by their oaths and consciences, to convict the Unitarian, who should profess his belief of blasphemy, for the Orthodox do not consider the Unitarian doctrines to be the doctrine of the Scriptures. In the same way, and upon the same principles, the Orthodox believer maintaining his sincere opinions, would be in danger of conviction of blasphemy by a Unitarian court and jury. That which might be considered the true doctrine one day, would be the next adjudged blasphemy, according to the changing success of various religious parties, obtaining one after another, the political power of the state, and the means of oppressing their adversaries.²³

²³ *Mr. Dunlap* here read from the letter of Jefferson, where Calvin is spoken of as blaspheming God; and from Dr. Channing's sermon, preached at New York, where the Orthodox are spoken of as calumniating God, in these words: "Suppose that a teacher should come among you, and should tell you, that the Creator, in order to pardon his own children, had erected a gallows in the center of the universe, and had publicly executed upon it, in room of the offenders, an Infinite Being, the partaker of his own Supreme Divinity; suppose him to declare, that this execution was appointed, as a most conspicuous and terrible manifestation of

The jury are the final judges of the law of every criminal case, where a general verdict of guilty or not guilty is returned. A general statute must be construed with strictness. The acts proved must be the very acts described and prohibited by the language of the statute, giving that statute a strict limited construction in favor of the accused.²⁵

The court still hold the power, in case the prisoner should be convicted, to fasten him to the pillory, and to set him on the gallows.²⁶

This statute, upon general principles relative to human legislation, cannot be enforced by juries, without renouncing their reason, or abandoning their consciences. It is beyond the grasp of finite faculties. It cannot be ascertained in what sense the legislature used the word "God" in this statute; therefore the law is unintelligible and cannot be enforced. If the word is used in a general sense, it includes all the various gods which are worshipped, and the idolater may claim to enforce the statute against those who deny his gods. If it is used in a limited sense, it must be assumed that the idolater denies the true God; so that the profession of his belief subjects him to be placed at the bar as a criminal, at the same time that it admits him to be a competent witness in our courts. (Philips on Ev.; *Curtiss v. Strong*, 4 Day 51;

God's justice and wrath and of the infinite woe denounced by his law; and suppose him to add that all beings in Heaven and earth are required to fix their eyes on this fearful sight, as the most powerful enforcement of obedience and virtue. Would you not tell him, that he calumniated his maker? Would you not say to him, that this central gallows threw gloom over the universe that the spirit of a government, whose very acts of pardon were written in such blood, was terror, not paternal love; and that obedience, which needed to be upheld by this horrid spectacle, was nothing worth? Would you not say to him, that even you, in this infancy and imperfection of your being, were capable of being wrought upon by nobler motives, and of hating sin through more generous views; and that much more the angels, those pure flames of love, need not the gallows and an executed God, to confirm their loyalty? You would all so feel at such teaching as I have supposed; and yet how does this differ from the popular doctrine of atonement?"

²⁵ Bacon's *Maxims of the Law*; 1 Bl. Com. 88; 2 Bl. R. 1226.

²⁶ Act of 1782, c. 81; Act of 1812, c. 134; Act of 1826, c. 105.

Swift's Ev. 48.) A similar difficulty arises, if we attempt to determine whether the word God is used in a Trinitarian or Anti-Trinitarian sense. In a matter of conscience, man is responsible to his maker only; and if a juror be a Trinitarian or a Unitarian, and believes this statute made to establish an erroneous doctrine, he cannot sustain it; so, likewise, if he believes all penal laws hostile to Christianity. If the statute is anything, it is a sectarian law to compel a belief in the Trinity. The people of the commonwealth, at the time of the passage of this act, were, generally, believers in the Trinity. Under the act, it is blasphemy to curse or reproach Jesus Christ or the Holy Ghost.²⁷

This statute declares it blasphemy to deny God's "final judging of the world." This was a blow aimed at Universalists, and no Universalist can sustain this statute by his verdict. The statute declares it blasphemy to expose to contempt and ridicule the canonical scriptures "or any part of them." The version intended, was undoubtedly the translation made in the reign of James I. Every part of that version, is, by this statute, held to be genuine. The legislature had no right to make a law, thus to cramp the mind, and to compel the adoption of errors.

By the common law, publications are considered libels which are offensive to morals, and hostile to the established religion and the established church. The case of the defendant does not fall within the doctrine of libels, relative to immoral publications, without reference to religion. In such cases, a blow is struck at the morals of the community; but an attack upon a particular religious belief, however coarse

²⁷ *Mr. Dunlap*, for the purpose of comparing this statute with "the English Trinitarian" statutes, read the "profession of faith" from the statute of 1 William and Mary, c. 18, the "toleration act," s. 17, of same statute; the statute of 9 and 10 William and Mary, for the suppression of blasphemy and profaneness; from the Province Laws of Massachusetts, against blasphemy and heresy; the act of 1697, against atheism and blasphemy. To show that statutes should be compared to ascertain the meaning of the law, he cited 1 Bl. Com. 60; cases in Big. Dig. 740.

and improper, is not necessarily an attack upon morality. There is no settled religious belief exclusively identified with morality. The indelicacy of the first article, published by the defendant, is rather an offense against propriety, than against morals. For that article, he is not morally or legally accountable. Mere indecency of style, like indecency in conversation, is not indictable.

Another branch of the law of libel which does not reach the present case, is respecting the abuse of persons. Abusive attacks upon opinions are not punishable by law. Thus unrestrained freedom of literary criticism is permitted. The law shields the character of a person, not his opinions. The article complained of contains no abuse of a private character. Professor Stuart makes the true legal distinction in his letter on religious liberty. The evil of abusive compositions cures itself. The coarseness of the abuse destroys its influence. The offense of an attack against religion is an offense against heaven, and to heaven belongs the prerogative to avenge. The moment it is assumed that an attack upon cherished opinions is an attack upon persons holding them, either no opinions can be examined, lest personal offense may be given, or else the peace of society will be lost. All freedom of opinion will be destroyed unless opinions may be freely examined. If they are correct they will stand; if incorrect the sooner they are exploded by reason, the better it is for the cause of truth.

It is contended, that an attack upon Christianity is necessarily an attack upon morality. Then it must be that they are not one and the same thing. But they are not inseparable. If so, there never could have been any morality without Christianity. We hear, from our most distinguished divines, that morality and religion are distinct. Was there no morality before Christ in the days of Homer and Socrates and Cicero? All history shows us that morality can exist without Christianity. But we have been told that Christianity is a part of the common law. Has the common law embraced all the religions of England which have obtained during its

continuance? There are in the books some sayings of judges supporting this doctrine, especially of Sir Matthew Hale; but his authority is equally good to support a prosecution for witchcraft. Jefferson has entirely invalidated the cases relied upon by the government to support this doctrine in his letter to Major Cartwright.²⁸ Here in an ancient case involving church interests, the court say, in ecclesiastical cases we give credit to the ancient writings of the church; that is, to the old records, etc. The word "ancient," is mistranslated "holy," and upon this perversion, hang all the English decisions; and it is by force of these decisions that the liberty of speech and press, and the rights of conscience are to be subverted in this country. Jefferson has been falsely called an unbeliever in Christianity. He was a firm believer in the doctrines taught by Christ, and a sincere Unitarian. The law of Christianity of England is founded only in the statutes made to protect England from Protestantism at one time, and Popery at another. We have not adopted these statutes. It was to escape them that the pilgrims left England.

The statute is in violation of the letter and spirit of the constitution.—It has been said that the constitution of the United States has adopted the common law, and the seventh article of the amendments and a decision in the circuit court are relied upon. There is a doubt how far the common law is a guide in civil suits in the United States, but none as to criminal causes. There is no offense at common law in the jurisprudence of the United States. *United States v. Hudson*, (7 Cranch 32.) There is no provision relative to religion in the constitution in the first article of the amendments, which is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The constitution and laws of the United States, so far from sustaining this statute against blasphemy actually destroys

²⁸ *Mr. Dunlap* read the letter. See *post*, p. 517.

its validity. By the constitution and laws of the United States, persons of every religious faith may be admitted as citizens.

Let us now examine the constitution of our commonwealth. In the first place we are referred to the religious test oath or subscription in the constitution, which was as follows: "I, A. B., do declare that I believe the Christian religion, and have a full persuasion of its truth." If the insertion of this test oath and subscription in the constitution, incorporated the Christian religion; then striking that test oath and subscription out of this instrument, must have struck out Christianity, and by the doings of the convention of 1820, this test oath and subscription were struck out of the constitution. The following oath is now taken by public officers: "I, A. B., do solemnly swear, that I will bear true faith and allegiance to the commonwealth of Massachusetts, and will support the constitution thereof, so help me God." Another clause, relied upon to prove that Christianity has been incorporated into the constitution, is this provision: "And every denomination of Christians, demeaning themselves peacefully, and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another, shall ever be established by law."

But this has also been struck out of the constitution. There has been a late amendment to the constitution. In this amendment, the words are not as formerly in the constitution, "every denomination of Christians;" but the words are, "every denomination." The word "Christians" was struck out. It is not so much these provisions of the constitution which have been read by the counsel for the government, as that which has not been read. It is that provision which emancipates the people from the shackles of tyranny in religion which mankind had worn for ages—that provision which abolished forever all penal laws and penal prosecutions on the subject of religion, and declared, in the most solemn manner, that no subject shall be hurt, molested or restrained in his person, liberty or estate for his religious profession or

sentiments. This is universal toleration, the vital principle of Christianity. Will this court or any enlightened Christian tribunal, disregard the pure precepts, and the perfect example of universal toleration, taught and displayed by Jesus Christ? Let us admit that our constitution does adopt the Christian religion. It is adopted in the incorporation of the principle of universal toleration, the great principle of Christianity. It is adopted in the declaration in our bill of rights, that no subject shall be hurt, molested or restrained in his person, liberty, or estate, for his religious profession or sentiments.

There are three propositions in the second article of the bill of rights. The first declares that it is the right and duty of men to worship the Supreme Being. The second contains a declaration that no subject shall be hurt, molested or restrained in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience. The third contains a declaration, that no subject shall be hurt, molested or restrained in his person, liberty, or estate, for his religious profession or sentiments. The only restrictions imposed upon the full and perfect enjoyment of these rights, are, that the public peace shall not be disturbed, nor others obstructed in their religious worship. The words are plain, and the language is explicit which proclaims the principle of universal toleration. If there were a doubt, the most liberal construction should be adopted, for that is in accordance with philosophy, philanthropy, the genius of our institutions, and the character of our people. If none are to enjoy protection from being hurt, molested or restrained in person, liberty or estate, except those, whom the legislature and the courts may consider to be of "religious profession or sentiments," the provision in the bill of rights is altogether superfluous, for those who are of "religious profession or sentiments," according to the opinion of the legislature and the courts, never can be in danger of being hurt, molested or restrained, in person, liberty or estate for their "religious profession or sentiments," and therefore need no protection. This bill of rights is a shield for the weak,

not a weapon of persecution for the hand of the strong. It is intended for those who alone need protection—those who profess unpopular sentiments respecting religion.

The established rule of construction of all written laws is thus stated in Dane's Abridgement, vol. 6, p. 598 :

“With regard to the different parts of a statute, there is one general rule of construction; that is, the construction of each and every part must be made on a full view of the whole statute; and every part must have force and effect, if possible; for the meaning of every part is found in its connections with the other parts; and it cannot be believed the legislature intended any part of the statute should be without a meaning, or without force or effect. These rules are not peculiar to statutes, but hold in regard to wills, deeds, and all instruments where the question is, What did the maker mean? Each ought to be so construed, if it can be, as to prevent any clause, sentence, or word, being superfluous, void, or insignificant; for this obvious reason, no maker of either can be supposed to mean that any part, clause, or word, shall be insignificant, superfluous, or void.”

Apply this principle of construction, that every word is to have its effect, to the clause in the second article of the bill of rights. The words of this clause are as follows: “And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.” In the first place all who worship God are protected in the most ample manner. After that come these words “or for his religious profession or sentiments.” This extends the constitutional safeguard, even to those, if there be such on the face of the earth, who do not worship God. These latter words are separated from the former phrase in the clause, by the disjunctive conjunction “or” which is used to distinguish a clear separation from, or an “opposition of meaning” to, the class of persons before described. If this be not so, these words, “or for his religious profession or sentiments,” are without any meaning, and altogether superfluous. All who worship God according to the dictates of their consciences, are first protected. Then

to remove all doubt, even those who do not worship God, if there can be any such, are also protected. These words, "or for his religious profession or sentiments," must have the effect to throw the constitutional shield of toleration over all sorts of unbelief, or else they are a dead letter, and must be considered to have been used by the framers of the constitution without a meaning. This is not to be supposed, unless one of the best established rules of construing laws be violated in a case where it should be most regarded. In the course of this trial, it has been intimated, that there is a nice and delicate distinction to be made, in considering the privileges secured by this second article of the bill of rights, between the right to enjoy opinions and the right to maintain and attempt to propagate them. Such a distinction is more nice than wise. Such a construction renders the constitution a mere mockery, for a man does not need the constitution to protect him in the enjoyment of his secret opinions. By the constitution, the defendant is not to be hurt, molested, or restrained, in person, liberty, or estate, for attempting to promulgate his sentiments respecting religion. If he have a right to hold those opinions, he has a right to make them known. Stuart says the doctrine of orthodox Christians is that "the friends of truth must trust to argument, to reason, to conscience, and to God."

Since the adoption of the constitution of Massachusetts, the constitution of the United States has been established as the supreme law of the land. That constitution, we have seen, has not a word in it on the subject of religious or irreligious belief, except in the amendments which declare that congress shall make no law to establish or prohibit religion. But the constitution, as we have also seen, declares that congress shall have power to establish a uniform rule of naturalization. Congress has done so, and under the naturalization laws citizens of other countries of every religion, and of no religion, are admitted to become citizens of the United States. If then, any man be admitted a citizen of the United States, under this law, is he not entitled to bring with him and profess and propagate his religious sentiments? The statute of blasphemy

in this state, not only violates the constitution of the commonwealth, but it cannot stand, consistently with the constitution of the United States, and the laws of naturalization under that constitution.

Mr. Dunlap gave a summary of the history of persecutions in this and other countries and concluded:

Gentlemen:—Is there no danger in mixing the ingredients of a poisoned chalice, that it may hereafter be commended to our own lips, and we ourselves compelled to drink the bitter draught of persecution to the dregs? We wish to live and hope to die in the Christian faith, and that our children may walk in Christian peace and liberty, without being exposed to molestation and persecution. We should beware then, how we establish the precedents of penal prosecutions on the subject of religion, which sooner or later have returned to plague the authors of such precedents, such violations of the rights of man. But it may perhaps be said, there surely can be no danger of retaliation, for the defendant and his friends are too few and weak, to excite alarm. So have thought and said all who have wielded the scourge of religious persecution. The unbelievers in Christianity may now be few, but from the constant alarm sounded from the pulpits and in religious publications, it seems that there is some apprehension lest their strength may be increased. We have been told of the dreadful scenes of the French Revolution. Was not infidelity in power, and were not those excesses new manifestations of the danger of the union of political, with either religious or irreligious fanaticism? But the blood shed by the infuriated infidel zealots of France during the short period in which they ruled, did not produce one such tragedy, as the St. Bartholomew massacre. Indeed the persecutions of other ages were the precedents by which the infidels of France attempted to justify their own flagitious enormities.

I again ask, is there no danger, in allowing ourselves to persecute those, to whom we are opposed, because they have not the strength to make resistance? Have we not seen the greatest power arise, from beginnings most inconsiderable in

political strength. The Christian flock were but one hundred and twenty in number at the gathering of the faithful, after the Shepherd had been stricken. Now they are numerous as the leaves on the trees of the forest, or the stars in the firmament, and the sands on the sea shore. Their religion is spread to the uttermost parts of the earth. The pure Christian worship is now offered up around the globe, and ever cheered by the light of the sun; for when that glorious luminary seems to us to sink in the West, and our evening prayers are rising, he appears to other parts of the world, to be rising from the East in the mild radiance of morning glory, and the orisons of other climes are ascending. But perhaps, it will be said, God has prospered and speeded the work of the propagation of our religion, because it is the religion of truth. Let not this delightful reflection deceive us into a mistaken security, let us not lay this flattering unction to our souls, for it should be recollected that God in his wisdom, has permitted a false religion to spread more extensively, than the Christian religion among men. The founder of that religion, was not born till about six hundred years after the Christian era. He had nothing to sustain his impositions but the influence of his majestic beauty of person, his enthusiastic and commanding eloquence, and his matchless valor. Yet he was crowned with conquest in his life, and has secured in the estimation of a larger portion of the human family, than is numbered in the hosts of Christendom, the reputation of a sage, the renown of a hero, and the glory of a prophet. His followers have obtained the possession of Egypt, where the family of Jacob was sheltered from the famine, and where Joseph and Mary and the child Jesus were protected from the persecution of Herod, and where Moses the law giver of the Jews, was born, preserved and educated. They hold in their hands the Holy City of Jerusalem, the spot where once stood the Temple of Solomon, and the seat of the Holy Sepulchre. The mountains whence the Commandments were declared is in their power, and the Hermits of Mount Sinai, when France sent her magnificent expedition to Egypt, brought down from their monastery,

their charter of toleration, signed by Mahomet, to be countersigned by the hand of Bonaparte. They have wrested from us, the magnificent city of Constantine, and the church of St. Sophia, the most elegant edifice ever raised for Christian worship, is now the most magnificent mosque in the Mahometan Empire. The victorious Musselmen spread with rapidity along the northern coast of Africa, passed the Straits of Gibraltar and conquered Spain. The mountains did not long impose a barrier to their conquests, for the conquerors of Spain soon rushed with the force of a torrent from the summit of the Pyrenees upon the plains of France. In one of the battles the Christians were defeated with such dreadful carnage that in sorrow and despair it was declared that "God alone could reckon the number of the slain." The Mahometan warriors passed the Rhine, and were in their victorious march upon Paris, when they were met and gloriously repulsed by Charles Martel, the hero of France and the last earthly hope of Christendom. Who can imagine what might have been the consequences, if the event had been adverse to the Christian arms, in that terrible conflict on the blood stained plains of France, on the issue of which the fate of the Christian cause, so far as it can depend on human events, seemed to be suspended. A philosophical historian thus speculates on this grand event, which checked the progress of the Saracen arms, then threatening to subdue all Europe. He says, "A victorious line of march had been prolonged above a thousand miles, from the Rock of Gibraltar, to the banks of the Loire, the repetition of an equal space would have carried the Saracens to the confines of Poland, and the highlands of Scotland; the Rhine is not the more impassable than the Nile or the Euphrates, and the Arabian fleet might have sailed without a naval combat into the mouth of the Thames." Perhaps, gentlemen, had the banner of the crescent triumphantly advanced in that fight, and the ensign of the cross fallen back in discomfiture, the discoverer of America might have planted in the new world the standard of the false prophet of Mecca, and a Mahometan judge might

this day have been sitting in your place, and condemning Christians, the victims of penal laws and penal prosecutions on the subject of religion. Nay more, as if it were to rebuke the presumption of man, in assuming to avenge with his feeble arm, the wrongs against heaven, and to enforce the scripture truth, that man cannot find out the Almighty unto perfection, God in his mysterious wisdom has allotted the best portion of this earth's heritage, "the clime of the east," and "the land of the sun," to the infidels for a possession.

Gentlemen, we behold how the true religion, which seems to have been left, since very early times, to human exertions, for its propagation, has risen, from small beginnings, to a mighty power. We behold also, how a false religion, by the zeal and perseverance of its professors, has been spread more extensively than even Christianity among men, and how much it has endangered, even in Europe, the Christian ascendancy. Should not the reflections which this historical review cannot fail to excite, teach us, that from the weakness, even of a false religion, may arise very great political power, and earthly strength. Does not the voice of all history instruct us, never to trample upon our opponents in religion, because we do not dread their present strength? False doctrines we see are permitted to exist among men, and infidelity may be allowed to stalk in our land, as in revolutionary France, and persecution will accelerate the day. Let us not then in this day of our power, establish dangerous precedents, and set a fatal example, by which our opponents may in case they shall obtain strength, retaliate upon our children the heaviest calamities. Let it not be in the power of infidels persecuting our children, to whom we will teach the pure doctrines of the Gospel, and to whom we will give a charge to teach to their children the same faith; let it not be in the power of infidels, who may persecute them for their religion, to reproach them with our example, and justify their violations of humanity and justice, by our proscriptions! You, gentlemen, will do as you please; but as an American citizen, I protest against this prosecution and it shall never be brought up in judgment against me or my posterity.

Gentlemen of the Jury, I am now worn down by the labors of this defense, and am almost ready to say, I have done. But I cannot close without returning my thanks to the counsel for the Commonwealth for his many courtesies, to the Judge for his constant indulgence, and to you for your patient and respectful attention. One more word, and we part. If the defendant shall fall in this prosecution, a nobler victim will fall with him, for the blow which is aimed at the prisoner at the bar is a fatal blow at the constitution of his country.

MR. PARKER'S CLOSING ADDRESS.

January 24.

Mr. Parker. Gentlemen: The counsel for the defendant has argued first, that the case set forth in the indictment does not fall within the statute. Secondly, that if it does, then the statute itself must be attacked and obliterated as unconstitutional and void. There is no question between the parties about the facts. They being established, the question now is as to the character of those passages. Do they, or any one of them blaspheme the holy name of God, in all or any one of the ways pointed out in the statute?

This is the same question raised by the defendant's counsel in other language in stating the first point of defense, to wit: does the case proved fall within the statute? The question is simply, what is the purport, effect, meaning and motive of the passages alleged to be obscene and blasphemous. The *corpus delicti* is, "blaspheming the holy name of God;" and this may be done in several ways, and proving it in one way only, will support the indictment. The criminal passages in the libel may be classed under four divisions. 1. Denying God. That of course includes the denying of his creation of, government of, and final judging of the world, which constitute four of the modes of blaspheming God's holy name, as pointed out in the law. 2. Reproaching Jesus Christ. 3. Reproaching the Holy Ghost. 4. Contumeliously reproaching the Holy Scriptures. First, the defendant is guilty under the first head, and he openly and unqualifiedly avows

Atheism. What are the words written by his own hand, and published by his direct order in this libel? I maintain that the words "Universalists believe in a God, which I do not," are an unqualified avowal of Atheism, a direct and "positive denying of God, his creation, government, and final judging of the world." That is the natural meaning of the language used—the idea that strikes every rational mind upon its first perusal, without resorting to any nice analysis or grammatical criticism. The counsel for the defense is, in my opinion wrong, both in the law he has stated and in the forced and unnatural construction of the defendant's language. All the courts in Westminster Hall, and all in the United States, who have tried libels, hold the true rule now to be, that juries shall construe the words of a libel, (they not being equivocal in themselves,) to mean what mankind in general from their common use and natural import would believe them to mean. The real question is, what upon the first perusal would men in general think, what idea would mankind receive from the words, "Universalists believe in a God, which I do not?" They would believe, as I contend to you, that he intended to convey this meaning, I do not believe in a God, though the Universalists do. The context shows that he was pointing out differences between Universalists and himself, and the first is, they believe in a God—I do not—that is the first difference. This is the natural import of the words in the libel, taking the whole piece together. Now a grammatical analysis will bring us to the same conclusion. What does the neuter relative pronoun "which" agree with? What is its antecedents? Being in the neuter gender, it refers to a thing, not to a person. A part of a sentence may be the antecedent to a neuter pronoun relative. Let us paraphrase the language. "Universalists believe in a God, which (thing) I do not believe." What thing? I answer, the belief in a God, in any God. If he meant differently, his language would have been different. If he intended not to profess and avow Atheism, not to promulgate it, his language would have been, "Universalists believe in a God in whom I do not believe"

“whom” being a masculine personal pronoun relative, referring to “a God” as its antecedent, that is, a particular God of the Universalists—or thus—“Universalists believe in a particular kind of God, in whom I do not believe”—or thus—“Universalists believe in a God, but I do not believe in a God like theirs—the God I believe in, (for I do believe in a God) has different attributes from theirs.” It is then manifest and clear, on every view of the subject, that what he said, and what he meant to say, the idea he intended to convey to the world was this—I differ from the Universalists, first, in this: they believe in a God, I do not believe in a God—that is a complete difference between us, a difference *toto cœlo*.

But, secondly, this libel in another place, blasphemes the holy name of God, by contumeliously reproaching him. Contumelious reproach is sarcastic, sneering, gibing ridicule, insulting and exposing to shame and derision. So the best dictionaries inform us. I now, therefore, call your attention to that part of the libel which relates to prayer. Can any man of common understanding, any human being one grade above an idiot, read that passage and communication, and not see in it contumelious reproach of God? Impossible! God, the Almighty, most holy, most sublime, omniscient, and eternal God, spoken contumeliously of, as a “poor gentleman,” a subject of pity, more to be pitied than General Jackson! To assert that death is an eternal extinction of life, that there is no eternal life, is denying God, and his judging of the world, and this in the third place, clearly falls within the statute, and would alone support the indictment. This, also, is too plain to need a word of comment. Thus, under the first division, the holy name of God is blasphemed. 1. By avowed, palpable, unblushing Atheism, denying his existence and attributes. 2. By the scandalous and impious irreverence and contumelious reproach, in the objectionable article on prayer. 3. By denying the resurrection of the dead, and God’s judging the world. Consider whether Jesus Christ is also contumeliously reproached in the obscene and impious

publication of the defendant. It is as manifest as language can make it. 1. He is expressly denied, and the defendant unhesitatingly declares, "that the whole story about him is a fable and fiction." 2. The obscene paragraph, on the first page of the libel, is a most indecent, scurrilous, sarcastic and sneering reproach on Jesus Christ. I will not offend you by reading or commenting on it. Did the libel contain no objectionable passages but these two, you would be compelled to find the defendant guilty, so full is the measure of his guilt, under the charge in this indictment. The counsel for the defense repeatedly, and with apparent sincerity, denied the defendant's liability criminally for the offensive article published in his absence. I repeat it, that the rule of law is that the proprietor and publisher in his paper is criminally answerable for a libel published in his paper in his absence; and though he never saw, heard of, or approved the libellous matter. I have already given the authorities upon this subject. As to the communication on prayer, there is no evidence that he did not read and approve of it before he published it, and the presumption of law, in the absence of such testimony, is, that he did both: and the other libellous piece was his own composition, and published over his own signature. By the law, therefore, he is criminally answerable for all three pieces. But I have not yet pointed out to you all the modes in which the defendant, in the alleged libel, has blasphemed the holy name of God according to the statute. Two more remain. The Holy Ghost as well as Jesus Christ, is contumeliously reproached in the obscene passage, and also again in the denial of miracles, and in attributing them to trick and imposture. The holy scriptures are contumeliously reproached in the libel—1. By denying God, who is proclaimed by them as their author, and whose existence and attributes are therein revealed. 2. By denying his creation, government, and judging of the world, as declared and taught throughout those scriptures. 3. By declaring the whole story of Jesus Christ, as therein narrated, to be a fiction and a fable. 4. By denying the miracles therein related as true,

and attributing them to trick and imposture. 5. By denying the resurrection of the dead, immortality, eternal life, and the final judgment of the world. 6. By that infamous obscene passage.

The second point in the defence, set up by the defendant's counsel is, that although the case and proof may and do fall within the statute, still you must acquit the defendant, because the statute is unauthorized by the constitution, is not constitutional, and is void and not binding. Having anticipated this point, which I had been informed was to be discussed in the course of the trial, and having expressed my views fully upon the subject in the opening of the case, I deem it unnecessary to repeat the same. Nor have I since heard anything said in the very elaborate and cumbersome argument from the other side, which in my judgment, in any degree shakes the positions I then maintained. I called your attention to the various parts of the constitution, its language in reference to God and the Christian religion; its confirmation of all former laws adopted and practised upon, both the common and statute law, of the colony, province, and state of Massachusetts Bay; I showed you what the common law and the statute laws were, in relation to blasphemy prior to the constitution, and pressed on your consideration that this last statute was passed among the first permanent laws, immediately after the adoption of the constitution, and was enacted by men, many of whom were members of the convention who formed and created that constitution. I stated to you that that statute had been enforced as often as once in every five years since its date, in one county or another, within the commonwealth, that every judicial tribunal before whom it came in question, had considered it as constitutional, and inflicted its penalties for its violation, the last and a recent case, having been recently tried before Judge Wilde, of the supreme court of this state, on the southern circuit. I reminded you that the constitution had been before the people for amendment, in the year 1820, and no objection was made to this law, and no debate intro-

duced into the convention, in which it was hinted or alleged to be unconstitutional; that considering the many prosecutions which have been instituted under it, and the many times it has been reprinted by order of the legislature, by commissioners, those learned and vigilant men, appointed to superintend the new editions of the statutes, it ought to be considered as settled and fixed law, that it was a constitutional statute, and as much as any one in the book.

The counsel for the defense has said, that if there was an Unitarian or Universalist within your panel, he could not give a verdict enforcing this law, without committing treason against his own conscience. This argument is neither correct nor fair. Whether a man has blasphemed the holy name of God, in any of the modes of doing it, pointed out in the statute, or has not, is a simple matter of fact, as much as whether a man has stolen a piece of personal property, or not: and, whatever your religious creeds may be, if you are honest and true men, if the fact be proved, you, as jurors, must say so, or violate truth; and I can conceive of no greater treason to conscience, than the giving of a false verdict, after you are sworn to give a true one. Nor can there be any mistake concerning what facts constitute the offense of blaspheming God's holy name, because to prevent any such mistakes, the statute is very explicit in enumerating and describing those facts. This is so clear, and the gentleman in the defense was so much oppressed with a sense of its weight and force, that he resorted to what I consider a desperate plunge to escape from it. The gentleman has said that the legislature had no power, right, or authority to make a law against blasphemy, nor to define what constituted blasphemy, and that you of the jury were of the people, the country on which the defendant had put himself for trial, and might blot this law out of the statute book, if you should think it was wrong that it should be there. The law commits to juries no such power. It is absurd, in my opinion, to suppose juries in any circumstances are above the law and constitution, and may abrogate both if they please. You cannot repeal the law even if you should

dislike it; and you are in duty bound to sustain this prosecution, if the facts on which it is founded be proved, whatever your religious opinions may be. It seemed to me a very strange argument, though boldly advanced by the prisoner's counsel, that because God is incomprehensible and past finding out, therefore the legislature cannot pass a law to prevent blaspheming his holy name. Atheism and blasphemy are detestable to Christians of every creed, and men of every religious denomination can unite under this law, and conscientiously give a verdict, according to the evidence, against an open blasphemer of God's holy name. I cannot pass over, without a notice, a very extraordinary argument, drawn from the naturalization laws of the United States. To use the gentleman's own language, "the argument proves too much to be sound." If the Gentoo, if the Turk, if the Jew, by becoming a citizen of the United States, has the unlimited power and right to bring with him his religion, and live according to its principles and customs, then the naturalization laws and the constitution of the United States authorize parricide, the murder of aged parents, as practised on the banks of the Ganges; polygamy and the establishment of seraglios, as allowed by the Koran; and all the Jewish laws of retaliation and cruelty which have been so eloquently denounced, an eye for an eye, a tooth for a tooth, etc.

You have been plausibly told that you are the people, you come out from the people, you represent the people, who made the constitution and the laws. I hope the learned gentleman did not mean to suggest, that as such people you had the power to repeal the constitution and laws. It would be the most monstrous principle ever suggested in a court of justice, that the jury were above the laws, and not bound by them, but had an arbitrary discretion, according to their own ideas of expediency, if they did not like a law, to consider it, and make it a dead-letter. Nor, for myself, can I see anything in this law against blasphemy, which deserves the outpouring of the vial of wrath, which the gentleman has bestowed upon it. If there be anything wrong in its principle

or form, it is very remarkable that it was not discovered before, and that during its constant operation for half a century, nobody has petitioned the legislature for its repeal. It required boldness of no ordinary degree to say to a jury, you ought to blot this law out of the statute book. In my humble judgment, you have no more right to make this law a dead letter, or refuse to enforce it, than you have to repeal or abrogate the law against murder, highway robbery, or forgery. No juror has arbitrary power. No man on the jury has the right to do as he pleases. He is under the law, restrained by the law, governed by the law, directed by the law, as much in the jury room as he is out of it, as he is in all other places; perhaps more so there than elsewhere, because in addition to the obligations of duty which everywhere are in force, he has in the jury room the sanction of his oath, the appeal to God, superadded to all other motives to do right.

JUDGE THACHER'S CHARGE.

JUDGE THACHER. In committing this case to you, I shall endeavor to confine myself to the points of law on which it depends. In one event, the defendant will have right to review the judgment of this court before a higher tribunal. Although this does not lessen the obligation which is imposed on you, to render a true and impartial verdict, or on the judge, to devote to the case his best learning and diligence; yet it serves to demonstrate the paternal care of the law, to protect the citizen from injustice. If the defendant did not publish the libel complained of, you will have no necessity to consider its contents. It is extracted from a newspaper, published in this city, called "Boston Investigator," of which the defendant is editor and publisher. This makes him answerable in law for its contents, having been published by his agents, and for his emolument. His mind pervaded and directed the work. He is not to be relieved from this responsibility, unless he can clearly satisfy you that the libel was inserted in the paper by some one without his order and against his will. It is not denied, that he was knowing to the

publication of all the extracts, which are set forth in the indictment, with the exception of the first, which relates to the incarnation and miraculous conception of Jesus Christ. This was taken from a paper which was first published in New York. The two preceding numbers had been published with the defendant's approbation. The third was received, the witness says, during his absence, and was inserted of course. It does not appear that the workmen had received any orders to delay the insertion till the defendant should return. But the witness says, that it was not taken from the editor's drawer. To the question, "was it the order of the editor, that nothing should be inserted in the paper but what came from his drawer?" he replied, no such order was ever given, but it was so understood. Now it does not appear, that the defendant, on his return, disapproved of the publication; nor has he ever disavowed it. If such a disavowal would not have altered his legal responsibility, it would have had its weight with you, and would certainly have mitigated the act in the view of the Court. If the editor of a newspaper, or other publication, can show that a libel was inserted in his paper contrary to his order, and surreptitiously, it would, I think, be a good ground of defense. But you must judge, whether the defendant has shown, as to this first article, any such excuse—and if not, he is answerable for that, as well as for the other articles of the libel. By not denying it, he has, I think, affirmed the act of his agent, and made himself answerable for the publication.

You perceive, then, that the defendant, once a minister of the gospel, is on trial for writing and publishing an obscene, impious and blasphemous libel against the Supreme Being, and the Christian religion, whereby it is alleged that he has offended against the common law, and also against a statute of this commonwealth. It is called an impious libel, because it is considered to have been written in a manner and with an intention, inconsistent with that reverence, which is due from a man to his Creator. It is styled a blasphemous libel, because it denies and contumeliously reproaches the holy

name of God, his creation, government, and final judging of the world;—because it contumeliously reproaches Jesus Christ, the Holy Ghost, and the holy word of God. This description is founded on the offense of blasphemy, as it is described in an act of this commonwealth, which was passed immediately after the adoption of the present constitution.²⁹ But it has always been regarded as an offense from the early settlements of the country. And unless the law in this behalf has been repealed, either expressly or by implication, it is still an offense. The proper meaning of blasphemy, at common law, appears to be profaneness against the general principles of religion and morality.³⁰ “It consists in the denial of the being, attributes, or nature of, or uttering impious and profane things against God, or the authority of the holy scriptures. But it is only committed by uttering such things in a scoffing and railing manner, out of a reproachful disposition in the speaker, and, as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion.”³¹ When such impious expressions are committed to writing, it becomes written blasphemy, and it is a blasphemous libel: certainly not a less offense against the act for its permanent form, in which it may be read by all mankind. In such case the exact words appearing, they may be weighed by the rules of just criticism, and nothing left to conjecture.

But you will carefully observe, that the defendant is not on trial for the principles of his religious faith. It would be singular to put a man on trial for articles of religious faith, when he avows that he has none. There is no such offense known to our law, as heresy in belief, or as non-conformity to an established form of worship. The law of this commonwealth recognizes no standard of faith, nor any established form of worship. There is no ecclesiastical tribunal in this commonwealth, invested by law with power to inflict spiritual

²⁹ Act of 1782, Ch. 8.

³⁰ 3 Meriv. 379.

³¹ Hume, II. 558.

censure upon offenders for the good of their souls. The only ecclesiastical tribunals which are known in this commonwealth, if they may be considered as such, are those, where the members have associated together under a church covenant, binding in conscience, for the purpose of social worship and instruction, with an agreement to watch over each other for mutual edification, to impart to each other counsel and advice, and with right to admonish and expel a member, who shall violate his religious engagement. Such voluntary associations have not the right to impose fines, or to subject an offender to civil disabilities. Any member may withdraw from the society—and the church may on its part, for just cause, refuse fellowship with a brother. The connection being voluntary, its continuance depends on the will of the parties, and may be dissolved by either. Ecclesiastical councils among churches of the congregational order, consisting of the pastors and delegates from neighboring societies, invited, are merely advisory bodies. They usually assemble to witness the regular introduction and ordination of persons into the office of the gospel ministry, and to assist in that ceremony, or to compose differences which may have arisen in a church. The result of their conference is usually respected in courts of justice, like the opinions of referees in civil cases, but these councils have no civil power, and they can only act by their advice, upon the consciences of the parties. If the defendant on trial has not committed an offense against the peace of the commonwealth, or against some known statute, you must find him not guilty. But as a libel of this description has not, within my recollection, been a subject of criminal prosecution in this state—certainly not in this court—it lays upon us the necessity of recurring to the principles of law, on which it is considered to rest.

The charge against the defendant is for publishing an obscene and impious libel against the Supreme Being. If an individual may be severely punished for publishing a base and injurious slander against a fellow-citizen, it would seem to be a great defect in the law of a well regulated state, if

there were no punishment for him, who should maliciously slander Almighty God, the eternal, immutable, and infinitely perfect Being, the Creator and Governor of all things, from whom government is derived, and by whom it is prospered. Not to restrain such impiety, would be to allow it. Because God is not swift to punish impious men in this life, for offenses committed against him, which at the same time affect the order and peace of society; some profess to believe that there is no God, no future life, no final retribution. Are such men to be permitted, at their pleasure, to inflict deep wounds in the moral and religious feelings of the rest of the community, by impious and obscene writings? The belief of a God is the first principle both of natural and revealed religion. Mankind have, in every age, and in every degree of civilization, believed and worshipped such a being; and it may fairly be inferred, that what men have always believed, nature must needs have taught. Whoever believes in such a being, recognizes his providence in the government of the world, of states and empires, over families and individuals. No legislator, ancient or modern, has undertaken to construct a system of civil polity on the principle of atheism. No society could long exist on such principle. The truth of this axiom has been practically demonstrated in our own age, and by one of the most polished nations of Europe. To speak reproachfully of the Supreme being, who is regarded by the pious as the source of all wisdom and of all good influences, has never been permitted by any civilized nation. In our own commonwealth, from its first settlement, such irreverence has ever been regarded, both as the height of impiety, and as a crime against the state.²²

Human laws, without the aid of religion, will do but little either to perfect the moral character of individuals, or to preserve the public peace. The good order and happiness of a society depend more on the morals and manners of the people, than on the number and severity of its laws. To the existence of civil society, there must be laws and courts

²² Act Nov. 1646; Laws Col. Mass. Bay, 58.

of justice. The great object in the latter is the discovery of truth, which is effected by means of judicial oaths, by which the actions and intentions of men are revealed. An oath is an appeal to Almighty God, whose providence is believed to regard the actions of men, justice being the object of his delight, and injustice of his displeasure, to help the witness, as he shall speak the truth. The forms of oaths have been constructed in all nations with a view to solemnize the consciences of men. One form of oath among the ancients, was in these words: as certainly as the eternal God liveth, I will speak the truth. Paul says, I call God for a record upon my soul, that to spare you I came not as yet unto Corinth. The sanction of an oath is wanted on many great and solemn occasions, as well as in courts of justice. But the good of society requires, that men should refrain from invoking the name of their maker, except when they are engaged in the offices of religion, or they are authorized so to do by the laws of the land. And whoever proclaims, either in words or by writing, that there is no God, and presumes to assert that he is a chimera, a mere fiction of the imagination, forfeits his right to testify in a court of justice, and offends against the constitution and laws of this state. To deny the being of a God, is to take away the very foundation both of natural and revealed religion. The truth of a particular system of revelation may be denied; because the facts on which it rests may be matter of dispute. But he who denies the existence of a God, must deny also the possibility of all communications from God to man, however necessary for his welfare. Such denial indicates, I think, great perversity of mind;—for the belief of a God is derived from the nature of man, which cannot be disputed, and from the internal consciousness of man, of which there is still less ground for dispute.

If the libellous publication for which the defendant is on trial, should be found by you to be obscene as well as impious, and to contain a disgusting mixture of religious discussion, irreverent thought, and impure language; it will

enable you to judge of the intent of the writer:—whether it was to correct errors in opinion, and to impart truth, which would be both lawful and commendable; or to demoralize the reader, and to offend his respect for sacred things by coarse and vulgar thoughts, and by indecent expression. In general, it is undoubtedly true, that he who allows himself in obscene and impious language, must have a depraved heart. It will be for you, then, to decide, after having read and carefully weighed the publication, whether it is obscene and impious; if that should be your opinion and belief, it will be your duty to find the defendant guilty. But the defendant, by his counsel, who has exhausted in his behalf all the topics of argument, arising from legal investigation or historical research, has contended that the case is not within the law against blasphemy, and if it were, that that law is not within the constitution;—that by the constitution of this commonwealth, all religion is a thing between a man and his creator, and that men may write, speak, and publish on all religious subjects with impunity, according to the dictates of their conscience. He contends, that to treat even the religion of the country with contumely and reproach, is no offense against society, and is not punishable by human laws. The individual so offending, is accountable only to his conscience and to his God. He may be a subject of prayer, but not of human punishment.

It would have been an incredible thing if a race of men, descended from the Puritan settlers of New England, who had sought a refuge in this wilderness, that they might enjoy a pure religion according to the dictates of their conscience, should in a lapse of a century and a half, have so far departed from the sentiments of their fathers, as to disregard all religious considerations, when they were forming a political compact, which was to be a rule for their conduct, and for that of their posterity in all future time. We find, however, that the framers of the constitution had not degenerated from the character of their ancestors, although their religion partook of the spirit of a more enlightened and liberal age. They recorded upon the frontispiece of

the constitution, their grateful acknowledgment to the goodness of the great legislator of the universe, for affording to them, in the course of his providence, an opportunity deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for themselves and their posterity;—and they “devoutly implored his direction in so interesting a design.” They thus recognized the being of a God—his providence in the government of states and empires—and the duty of individuals and communities to pray to him for his guidance in human affairs, and especially when they were about to enter upon any great design, which was likely to be followed by permanent effects. In the second article of the declaration of rights, they declare, that it is the right, as well as the duty, “of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great creator and preserver of the universe.” Next, that “no subject shall be hurt, molested, or restrained, in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.”

In thus allowing all persons to worship God according to the dictates of their conscience, the people of this commonwealth effectually established a universal toleration of all religions, so far as to put their disciples under legal protection; and it was thus made the duty of the legislature to pass such laws, as would enable them to enjoy their peculiar rites of worship undisturbed. Christians of every denomination, Protestant, Catholic, Jews, Mahometans, the disciples of Confucius, and the Bramins of Hindostan, whose worship would not disturb the public peace, and whose manners and customs would not offend against our laws, might all rest in peace under the broad shadow of this fundamental law of the republic. The first fruits of this article was the act of 1782, c. 8, declaring the offense of blas-

phemy. "If any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world, or by cursing, or contumeliously reproaching Jesus Christ, or the Holy Ghost, or by cursing, or contumeliously reproaching the Holy Word of God," he shall suffer the penalty which is therein declared.

It is evident that this act, by its letter and spirit, was intended to restrain and punish all those who should presumptuously revile the great first principle of all religion, natural and revealed—the name and attributes of God. As we were at that time, and still are, a great community of believers in the Christian revelation, it is equally clear to my mind that this act was further intended to preserve the public peace, and to protect the feelings of all Christians of every sect or party, from violation, by restraining and punishing impious men who should presume to revile the fundamental principles of their common belief. All Christians profess to believe in the divine Unity:—but a very large proportion hold, that the Godhead consists in Father, Son, and Holy Ghost—three persons but one God, from all eternity. The great majority of Christian professors, both in the new and old world, believe in this mystery of a trinity of persons in one God, and worship him as such. For the purposes of this trial, at this time, all that concerns us is, not the truth of the doctrine, but the fact. There have, however, been in every age of the church, there was at the adoption of the constitution, and there is now, another class, much smaller, I know, than the great body to which I have just referred, who believe in one God, supreme and undivided, and who regard him as the only proper object of religious worship. They offer prayers to him in the name of the "one mediator between God and man, the man Christ Jesus." And they ask of the Father, in his name, and for his sake, to confer upon them the gifts of the Holy Spirit in this life, and eternal happiness hereafter. It is wholly immaterial, for the purposes of this trial, which of these grand

divisions of the Christian church is most free from error. Let no man, nor any body of men, presume upon their own perfections, nor expect to be free from error in sentiment or conduct, till they arrive at a better state. It is sufficient for us now to know, that the constitution and this act of the legislature which emanated from it, meant to restrain and punish all who should presume, to the disturbance of the peace, wilfully to revile and calumniate the fundamental principles of natural and revealed religion, as they were held generally by the people of this commonwealth. It was the policy of the government to restrain the citizens, as much as possible, from wars among themselves, and from all persecution for conscience sake. The words of the act are, I think, broad enough to admit this extensive construction. It is consistent with the spirit of the constitution. It tends to promote peace and charity, which is the bond of perfection among different sects of Christians; and it imposes a most necessary restraint on those persons, who, knowing how much it wounds a man of religion to hear calumnies uttered against his God, hesitate not, still, to exasperate, in that way, the best feelings of his heart.

The celebrated third article of the declaration of rights has been recently modified and amended by the people. But it is necessary that we should examine the provisions both of the original article and the substitute. Any act of the commonwealth, which is contrary to the principle of that amendment, is virtually repealed by its adoption. In the third article, the framers of the constitution declared "that the institution of the public worship of God, and of public instructions in piety, religion and morality" were essential to the happiness of a people, and to the good order and preservation of their government. The legislature was therefore invested "with power to authorize and require the several towns, parishes, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of

piety, religion, and morality, in all cases where such provision should not be made voluntarily." The legislature was likewise invested "with authority to enjoin, upon all the subjects, an attendance upon the instructions of the public teachers, aforesaid, at stated times and seasons, if there were any on whose instructions they could conscientiously and conveniently attend." But an exclusive right was given to the several towns, etc., "at all times, of electing their public teachers, and of contracting with them for their support and maintenance." It was further provided, that the moneys paid by the subject to the support of public worship, "should, if he require it, be uniformly applied to the teacher of his own religious sect or denomination, provided there were any on whose instruction he attended." And it then adds, that "every denomination of Christians, demeaning themselves peaceably, and as good subjects, should be equally under the protection of the law; and that no subordination of any one sect or denomination, to another, should ever be established by law." The amendment or substitute for this article, acknowledges, "that the public worship of God, and instructions in piety, religion, and morality, promotes the happiness and prosperity of a people, and the security of a republican government;—therefore the several religious societies of this commonwealth, whether corporate or incorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses. And all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract, which may be thereafter made, or entered into by any such society;—and all religious sects and denominations demeaning themselves peaceably and as good

citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."

By this amendment all societies of every denomination of religion, are entitled to equal protection. They may elect their own teachers, and contract with them for their support, which contracts will be sustained in law. The amendment contains nothing which is disrespectful to religion, or the professors of any religious sect. It considers the religion of every individual as a matter between God and his conscience. It leaves him free to believe or not to believe, to worship or not to worship, and to contribute or not to contribute to the support of a religious teacher. Formerly it was the right and duty of the legislature to compel the citizens to support Protestant teachers of Christianity, if they were not supported voluntarily. But the power is now taken away: and Protestant teachers can now claim no greater protection than is enjoyed by those of every other religion. Still, however, the citizen enjoys the perfect rights of conscience; and the name of the Supreme Being, and reverence for religious institutions, still stand in capitals upon the front of the constitution. There is nothing in the constitution or laws of this commonwealth, which permits any one with impunity to publish an obscene and impious libel, reflecting on the Supreme Being or the Christian religion. To tolerate the free circulation of such productions, would prove that we were not sincere men—that we valued neither our religion, nor its author—that while we honored him in word, we yet suffered his name to be calumniated, and his honor to be trampled in the dust. If therefore you find, on inspecting the libel in this case, that it is both obscene and blasphemous, I think that his defense will have failed, and that the defendant will have offended both against the law and the constitution of the commonwealth.

It is admitted that the passages contained in the indictment are truly extracted from the "Boston Investigator." But I advise you to compare them with the original, and to

form an opinion for yourselves. The rule upon this subject is, that a single offensive passage is not to be selected and considered as conclusive evidence against the defendant; but it must be compared with the context; or those other parts of the work to which it seems to bear a relation; and from the whole taken together, your judgment is to be formed. The first passage, on which the counsel for the government relies against the defendant, to prove that he has committed the offense of blasphemy, is contained in what is called the third extract, which is set forth in the indictment. By a reference to the original piece, you will perceive that it is a letter published by the defendant in the Boston Investigator, addressed to the editor of the Trumpet, to remove an erroneous impression which some had, that he was still a Universalist. The learned counsel for the government contends that this is a plain declaration of Atheism, written in such scornful and contumelious language, as to bring it within the act against blasphemy. In asserting what Universalists believe, and what he did not, in the four several specifications, the defendant adopts a similar phraseology. "Universalists believe in a God, which I do not." "Universalists believe in Christ, which I do not." "Universalists believe in miracles, which I do not." "Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not." But the counsel for the defendant contends, that all that he meant by this assertion was, to say that "the God in whom Universalists believe, I do not"—a form of expression which he asserts, is not uncommon among controversial writers. He insisted, too, that his client actually believed in God, and he repelled with indignation the imputation of Atheism. You will recollect, that the court observed to the counsel, at this stage of his argument, that it was gratifying to hear him disavow, on the part of his client, the doctrine of Atheism, and that it would be highly satisfactory, and perhaps useful for the defense, that he should then state, what God the defendant meant to substitute in the place of him whom Christians revered. To

that observation, the ingenious counsel replied, that his client was not bound to make the explanation—it was a matter solely between him and his God. It was undoubtedly within the discretion of the defendant to give such explanation or not. But the court expected, from the course of the argument, that there was something in the piece itself, on which the defendant meant to rely, to repel the charge of Atheism; especially as he offers the piece as a sort of profession of faith, and desires to tell the readers of the *Trumpet* in his own language, “what he did, and what he did not believe.” It belongs to you, however, exclusively, to judge of the import of the piece. The general rule is, in such cases, to construe words according to their plain and natural meaning; and where words are equivocal in their nature, they are to be construed most favorably for the party on trial.

After this avowal of what the defendant does not believe, it would seem to be a mere matter of curiosity to inquire what he does believe. Rejecting all religion, natural and revealed, and considering death as the extinction of being, nothing like religion seems to remain in any sense of the word. What advantage has he over the beast that perisheth excepting the perfect consciousness of the miseries of this life, without the least consolation from the hope of a better? This declaration of a man, who was once a minister of the gospel, has been published by him, and is now circulating in a newspaper for his profit, among thousands of the poor and laboring classes of this community. And I cannot omit to repeat, in this connection, the observation of the illustrious Erskine, in the trial of Thomas Williams, for publishing Paine’s “*Age of Reason*,” in the court of King’s Bench before Lord Kenyon, in 1791.³⁴ Of all human beings, he says, the poor stand most in need of the consolations of religion, and the country has the deepest stake in their enjoying it, not only from the protection which it owes to them, but because no man can be expected to be faithful to the authority of man, who revolts against the government of God.

³⁴ 26 How. St. Tr. 654.

But the defendant claims the right to think as he pleases, and to publish his sentiments, which right is indeed secured to him by the laws of this commonwealth. His counsel has taken a wide range, and furnished ample quotations from controversial writings, ancient and modern, and even from celebrated writers of the present day, to justify the style of these extracts. If they are written according to the rules of disputation among the learned; if they are decent in their character, and published with the view to correct error, and to diffuse truth; he will not have offended against any law. If he has merely asserted his disbelief in all the popular notions of Christianity, without attempting, by impious and obscene remarks, to wound the feelings of the whole Christian community, he will not have committed an offense of which this court can take notice. But you are to consider, that the people of this commonwealth believe in the existence of a Supreme Being, in Jesus Christ, as the Saviour of the world, and in the Holy Spirit as the sanctifier and comforter of his people. In connection with faith in these articles, they believe, generally, in a future state of rewards and punishments, in the immortality of the soul, in a righteous final judgment, and in the essential relation between present virtue and future happiness. Great shades of difference undoubtedly exist in the opinions of the various Christian sects on these subjects.

In a court of justice, it is our duty to take notice of the existence in our commonwealth of this diversity of belief and sentiment. It is of no consequence, at this time, to what denomination you or I belong. As for myself, I freely avow that I am attached to the free institutions of my country, and bound to give to them all the support which they can derive from my feeble hands. But we are to execute the laws, as they are, according to their letter and spirit. The law regards the great multitude of religious sects, as standing on equal ground, and as having equal rights; and that no one has claim to pre-eminence over the others. No person may treat them with contumely and reproach. None

may insult their religious feelings with indecent language. And none may disturb them in the performance of their religious rights. I know that there are some coarse minds, who think that there is no practical liberty where they have not the right freely to do wrong. But if, under the color of a rare liberty, an Atheist, or other impious person might insult Christians with impunity, the law would deny to their religion the protection which is stipulated in its favor by the constitution.

If the object of the defendant was to correct prevailing errors, you have a specimen of his style both of reasoning and illustration, in the first article, which is set forth in the indictment, and which the learned counsel, on both sides, have, from respect to modesty, omitted to repeat. It is one of those impure passages which deform the writings of Voltaire, bad enough in the original, still worse in the translation. It is a pity that the translator could not have selected from the writings of that illustrious genius, something friendly to virtue and literature, of which there is abundance, and that his vitiated taste should have fallen upon a passage which equally offends against modesty and religion. You will perceive that it refers to that article of belief among all Christians, with but few exceptions, that the conception of the blessed Saviour was miraculous, and not according to the course of nature. If he had meant to say that Jesus Christ was a mere man like ourselves, and that Joseph was his father, could he not have found language to express the sentiment with decency, without a disgusting reference to those parts of the human frame which nature has taken so much care to conceal, which even savages cover with the veil of natural modesty, and of which among the civilized it is always deemed indecent to speak? Had the writer been speaking in this passage of a common man, his language would have wounded the ear of purity. But he was speaking of him, whom so large a portion of the Christian church worship as one of the trinity of persons composing the Godhead, and whom all Christians reverence as the Saviour of the

world; who was raised from the dead by the power of God, who now sitteth at the right hand of God, whence he will come to judge both the quick and the dead. It is for you to decide whether his language was fitting—whether it is not both obscene and impious.

One other article in the indictment remains for your consideration; and it will be for you to judge, whether the writer could have risen higher in the scale of impiety. It is that in which he speaks of prayer. It will be difficult, I think, to decide from reading the piece, whether it was the object of the writer to cast most ridicule upon the prayers of pious men, or upon God, the object of all prayer. But how perfectly harmless are wit and ridicule on such subjects! Prayer is the breath not of Christians only, but of the devout of all religions. It seems to be, from its universality, the voice of nature ascending from all intelligent beings to their common Creator. But the writer of this piece presumes, most irreverently, to call the Supreme Being, with a sneer, the Old Gentleman, and to compare him with a mortal man; to make him a subject of pity, assailed from all quarters, by day and by night, with contradictory petitions, which he can neither recollect nor grant. He represents him as obliged to keep a set of books and clerks, to record the various petitions, but unable to dictate to them what petitions to record. Thus he presumes to represent him, who pervades all things by his virtue, and governs all things by his providence, as such a weak, imperfect, and perplexed being as ourselves.

If you believe that the defendant has published these things in his newspaper, unwittingly, not knowing the force of words, and devoid of an evil intent,—he will be entitled to your verdict of acquittal. But if you believe that he, well knowing the force of words, and intending to propagate the gloomy doctrines of Atheism, has, by this publication, blasphemed the holy name of God, and denied him—that he has reproached Jesus Christ, by representing his history as a fable, and his miracles as the tricks of an imposter—and that

he has contumeliously reproached the Holy Scriptures— thus endeavoring, in his malignity, to disseminate his impious sentiments among the poor and ignorant, and to deprive them of the faith and hopes of religion, the sole consolation of the miserable, both in life and death,—you must find him guilty. Judge his cause with charity, but let your verdict be the voice of wisdom and truth.

THE VERDICT.

The jury found the defendant *guilty*.

May 13, 1834.

Mr. Kneeland appealed to the Supreme Court where the case was tried before HON. SAMUEL PUTNAM^a the trial beginning today before the following jury: Joseph H. Dorr, Joseph Bumstead, James Bates, George Brown, Horace A. Breed, Edward D. Clark, David Clapp, Jr., Ebenezer Durgin, Calvin Dimmick, Anthony Finch, Benjamin C. Frobisher and Charles G. Greene.

The same evidence was introduced as at the former trial and the same counsel appeared on both sides.

Mr. Parker. Gentlemen of the jury: The general maxim is, no man shall be put in jeopardy twice for the same offense: there is under our law a provision in favor of the defendant, but denied to the prosecutor: the party accused may entitle himself to a second trial, and may appeal from the inferior to the supreme tribunal and have his case reviewed, both upon the law and the fact, in the court of the highest resort. He is not indeed putting himself in jeopardy twice, but taking a new opportunity of getting out of jeopardy. A verdict of acquittal in the court below, however erroneous, is conclusive against the government, and the prisoner is forthwith discharged. Not so the verdict of guilty: erroneous or correct, he may appeal, and make another effort for acquittal. The law thus tempering justice with mercy, seems anxious to secure a fair and impartial trial for the accused. Jealous, perhaps, of the natural and

^a See 1 Am. St. Tr. 108.

indirect influence and power of the state in all cases where it is a party, it extends its protection to the prisoner against all possible injustice which may arise from ignorance, accident, surprise, extraneous influence, prejudice or popular excitement: and for all offenses, a person tried and convicted in the lower court may come here and have his case maturely reviewed. There is no exception but in causes wherein the municipal court sits as an appellate court. But in all those cases where life itself is the forfeit of the crime, the law, still more careful to secure the best mode of trial to the prisoner, and guard him from the irretrievable consequences of an imperfect trial and erroneous result, doth not permit its inferior tribunals to take cognizance of the matter. It requires the government to bring the accused at first into the highest tribunal, and should it happen that from his poverty, the odiousness, malignity or certainty of his offense or other cause he has no advocate to defend him, the court by its authority over its officers assigns two counsellors learned in the law to undertake the defense, to make their best efforts to save his life, to see, that, if condemned, it be according to law; and they have no right to refuse to bring their time, learning and talents to the aid of the unfortunate being on trial, in the hour of his peril, although unfeared and however pressed with other duties, and further, in a case involving consequences so serious, the law will not trust the trial to a single judge, but requires the collected and united wisdom, learning and care of all or the major part of its supreme judges to see that justice is rightfully and fairly and mercifully administered, where life or death is to be the consequence of the verdict. It is therefore in tender mercy to a prisoner charged with a capital felony, that he is not subjected to a trial in an inferior tribunal, from which he might not be able to make an appeal by complying with its conditions, while all other persons accused must submit to the consequences which may follow an investigation in the lower courts, and undergo (if found guilty there) the prescribed punishment, unless they come here at their own expense for a review of their cases.

The policy or expediency of granting appeals where only facts are in dispute has often been questioned, and many jurists have proposed that only points of law and decisions thereon should be re-examined in the upper courts; as many events may happen in the interim (sometimes a full year) between the trials, and much testimony be irrecoverably lost. Witnesses may die, or leave the state, be spirited away or tampered with; documents may be lost, and memory become weak or treacherous, and other disadvantages occur. Nevertheless the legislature of this commonwealth, acknowledging the principle that all crimes are mixed questions of law and fact, and that the jury have a right to decide upon both, have granted the right of appeal to all persons supposing themselves aggrieved by the proceedings in the inferior court, and have authorized them under certain conditions to come here and demand a new trial, and that new trial is to have no reference to the former one, and not be prejudiced by its result, and in the case now to be submitted to your consideration, the aged defendant here on trial, whose reputation and personal liberty is as dear to him perhaps as his life, has not only lawfully but properly availed himself of this legal right. If it had been possible in this county to have presented this cause to a jury in this court, who had never heard of the former trial, I would never have mentioned it. Our courts are by law open courts; and persons, who come here to hear, are apt to go elsewhere and publish our proceedings to gratify the curiosity of those who could not come. Our population covers but a small tract of ground, and what is known to some very soon becomes notorious to all. The daily press, competing with its own numerous rivals, gleans everything of interest from every department of life to cater for the public appetite for news, and the judicial tribunals are subjected to a large share of its notice, not to say surveillance and espionage, and sometimes to no little of its unbounded abuse. This very cause has been grossly misrepresented in some prints, and the law and the court misrepresented. Nevertheless, it is, and ever has been, my sincere

desire that this as well as all other defendants should have a fair and unprejudiced trial; and therefore, though you must know from many sources that this cause has been once tried, and what the result was, I beg of you not to let that knowledge have any effect on your decision of this case. You are sworn to try this issue upon the evidence given to you, of the law and the fact, at this time and in this place. It would be a mockery to give a man an appeal, and let the jury in the appellate court be governed or even influenced by the verdict in the court below. What other men thought under certain circumstances of evidence and certain directions of a judge not now presiding, is no concern of yours. You are to be directed by the light of your own minds and the dictates of your own consciences, after hearing the evidence, the arguments of counsel, and the charge of the court. The former verdict is null and void by the appeal, and you are to try this cause in the same manner as if the indictment was this morning fresh from the grand jury's room, and never before been heard of, or seen. With this view of your obligations both to the commonwealth and to the defendant, I now invite your attentive consideration to what in the discharge of my duty I shall deem it proper to say in the opening of this cause to you, now sworn on your part to do justice between the commonwealth and the defendant.

May 15.

Mr. Dunlap for the prisoner repeated his arguments made to the jury on the former trial.

Mr. Parker in his closing speech to the jury did the same, concluding as follows (after referring to *Mr. Erskine's* speech in *Williams' case*, *Sir Vicary Gibbs' in Eaton's case*, *Chief Justice Kent's opinion in Ruggles' case* 8 Johns.; *Judge Duncan's opinion in Updegraph's case* 11 S. and R., and *Chief Justice Parsons' opinion in Barnes v. Falmouth*).

Now in opposition to these authorities we have a letter of *Thomas Jefferson*, and whatever else the gentleman could bring to bolster it up, I promised you that if that letter was introduced, I would endeavor to satisfy you that the argu-

ment it contained had no substance or weight in it, and I will now attempt the performance of that promise.

About ten years ago, Major Cartwright, an octogenarian English reformer, wrote a book with a title, "The Constitution Produced and Illustrated." Like others of his works (for he was voluminous like Cobbett) it fell still born from the press, but he thought it deserving of a passage across the Atlantic ocean, and he sent one to Mr. Jefferson, then also an octogenarian. You, gentlemen, doubtless know, that the English constitution, whatever it may be, is unwritten, having grown up into a system, like the common law, from customs, usages, and prevalent principles. Still it is somewhat indefinite. Unlike the prescript constitutions of several of the United States, it cannot be produced in black and white, and subjected to verbal criticism or grammatical and reasonable construction. It has therefore been the subject of much dispute, especially within the last fifty years, since the question of reform began to agitate England. Many contend that the constitution is but the will of Parliament, that Parliament is omnipotent, etc. Others deny this doctrine. Major Cartwright wrote much on this vexed question, and finally published the book I have just mentioned with the imposing title. His notion is, that the English constitution was created and formed by the Anglo-Saxons, some traces of which are still discoverable in the laws, history, usages and customs of the Saxon heptarchy. He produces a few detached parts, and argues, *ex pede* Hercules. All that he finds inconsistent with his views, he very complacently and with a magisterial air calls legislative or judicial usurpations; and he seems to think that what cannot be traced to the Anglo-Saxons cannot be constitutional. Much of his theory is fancy, more especially as the primitive Anglo-Saxons were as unlettered as the aboriginal Indians of our country; and his theory has floated away like the fabric of a vision. Mr. Jefferson thought proper to return thanks for the present of Major Cartwright and yielding to old age's propensity to garrulity, he wrote back a communication which he himself

calls a "long and rambling letter." Among the various matters that his pen touched upon, was Christianity, his hostility to which was notorious all his life long. He steps out of his way to throw an imbecile dart, *telum imbecile sine ictu*, at this system of religion, and exhibited at once a proof of his senility and injustice. This letter, so much eulogized by the defendant's counsel, contains these six propositions, which I propose briefly to examine, and hope to refute. Here is Mr. Jefferson's letter which I will read:

"I was glad to find, in your book, a formal contradiction, at length, of the judiciary usurpation of legislative powers; for such the judges have usurped in their repeated decisions that Christianity is a part of the common law. The proof of the contrary which you have adduced is incontrovertible, to wit, that the common law existed while the Anglo-Saxons were yet Pagans; at a time when they had never yet heard the name of Christ pronounced, or knew that such a character had existed. But it may amuse you to show when and by what means they stole this law upon us. In a case of *quare impedit*, in the year book, 34, H. 6. fo. 36. (1453) a question was made how far the ecclesiastical law was to be respected in a common law court? And Prisot, c. 5. gives his opinion in these words—*A tiel lie que ils de seint eglise ont en ancien scripture, covient a nous a donner credence; car ceo common ley sur quels tous manners leis sont fondes; et auxy, sir, nous sumus obliges de comustre leur ley de saint eglise; et semblablement ils sont obliges de comustre nostre ley; et, sir, si petit apperer a nous que l'evesque ad fait come un ordinary fera en tiel cas, adonq nous devons ceo adjuger bon, ou auterment hemy,*" etc. See S. C. Fitzh Abr. qu. imp. 39; Bro. Abr. qu. imp. 12. Finch in his first book, c. 3. is the first afterwards who quotes this case, and misstates it thus—"To such laws of the church as have warrant in Holy Scripture, our law giveth credence," and cites Prisot, mistranslating "ancient scripture," into "Holy Scripture," whereas Prisot palpably says "to such laws as those of holy church have in ancient writing, it is proper for us to give credence," to wit, to "their ancient written laws." This was in 1613, a century and a half after the dictum of Prisot. Wingate, in 1653, erects this translation into a maxim of the common law, copying the words of Finch, but citing Prisot. Wingate, max. 3. and Shepherd, tit. "Religion," in 1675, copies the same mistranslation, quoting the Y. B. Finch and Wingate. Hale expresses it in these words, "Christianity is parcel of the laws of England." 1 Vent. 293, 3 Keb. 607, but quotes no authority. By these echoings and re-echoings, from one to another, it had become so established in 1728, that in the case of the King v. Woolston, 2 Stra. 834, the court would not suffer it to be debated, whether to write against Christianity was punishable in the temporal courts at

common law? Wood, therefore, 409, ventures still to vary the phrase, and says "that all blasphemy and profaneness are offenses by the common law," and cites 2 Stra.; then Blackstone, 1763, IV. 59, repeats the words of Hale, that "Christianity is part of the common law of England," citing Ventris and Strange; and finally Lord Mansfield, with a little qualification, in Evan's case in 1767, says "that the essential principles of revealed religion are parts of the common law," thus engulfing Bible, Testament, and all, into the common law, without citing any authority. And thus far we find this chain of authorities hanging link by link upon one another, and all ultimately upon one and the same hook, and that a mistranslation of the words "ancient scripture" used by Prisot. Finch quotes Prisot; Wingate does the same; Shepard quotes Prisot, Finch and Wingate; Hale cites nobody; the court, in Woolston's case, cites Hale; Wood cites Woolston's case; Blackstone quotes Woolston's case, and Hale; and Lord Mansfield, like Hale, ventures it on his own authority. Here I might defy the best read lawyer to produce another script of authority for this judiciary forgery, and I might go on further to show, how some of the Anglo-Saxon priests interpolated into the text of Alfred's laws, the 20th, 21st, 22nd, and 23rd chapters of Exodus, and the 15th of the Acts of the Apostles, from the 23rd to the 29th verses. But this would lead my pen and your patience too far. What a conspiracy this, between church and state! Sing Tantarara, rogues all, rogues all. Sing Tantarara, rogues all!

Here are Mr. Jefferson's six propositions:

1. That the English judges have usurped legislative powers in their repeated decisions that Christianity is a part of the common law.
2. That the proof of the contrary which Major Cartwright has adduced is incontrovertible, to wit, that the common law existed while the Anglo-Saxons were yet Pagans, at a time when they had never yet heard the name of Christ, and that that is proof Christianity is not part of the common law.
3. That the English judges stole this law upon us.
4. That Sir Henry Finch mistranslated the words of Prisot.
5. That the words "ancien scripture" mean the ancient writings of churchmen, that is, the ancient ecclesiastical or canon law.
6. That all the common law authorities hang, link by link, one upon another, and ultimately all upon one and the same hook, and that a mistranslation of the words "ancien scripture."

I think the reverse of these propositions can easily be main-

tained, and Mr. Jefferson's name will give them no more credit, than it did to his calumnious attack upon the venerated Washington.

1. The repeated and constant decision of the English courts that Christianity is a part of the common law, is pronounced a judicial usurpation of legislative powers. This seems to me a libel upon the judges. What is the common law, of which it is said the general principles of Christianity are a part? Blackstone says the laws collected and published by Alfred (*legum Anglicarum conditor*) and republished (with the additions and improvements which a century and a half had suggested), by Edward the Confessor (*restitutor, legum Anglicarum*) are the laws which gave rise and origin to that collection of maxims and customs which is now known by the name of the common law. Mr. Reeves³⁵ says the common law consists of those rules and maxims concerning the persons and property of men, that have obtained by the tacit assent and usage of the inhabitants of this country, being of the same force with acts of the legislature. Some of the common law is derived from the Britons, and some from the Romans, from the Saxons, the Danes, and the Normans. To recount what innovations were made by the succession of these different nations would be impossible at this distance of time. "Our laws," says Bacon, "are as mixed as our language, and as our language is so much the richer, the laws are more complete."

The early history of the Island of Great Britain shows it first in the possession of the Picts and Britons, next of the Romans, then the Britons again, then the Saxons, then the Danes, then the Saxons again, and then the Normans. The common law, says Crabbe, had that name because it was the common municipal law or rule of justice in the kingdom, drawn from the several particular codes then in use, and because it was admitted by the common sense of mankind. It was called *lex terrae*, or the law of the land, because it was,

³⁵ History, English Law, pp. 1, 2.

as it were engrafted into and became a part of the constitution of the country.

Lord Hale³⁶ says, there is no complete series of acts of Parliament, or of judicial decisions, so that use and custom, judicial decisions and resolutions, and acts of Parliament, though not now extant, might introduce some new laws, and alter some old, which we now take to be the very common law itself, though the times and precise periods of such alterations are not explicitly or clearly known.

Such being the common law, of which it is said that Christianity is a part, let us see whether the incorporation of it into that law arose from judicial usurpation, as Mr. Jefferson says. Upon this point, Mr. Jefferson was either lamentably ignorant, or wilfully unfair. A few historical memoranda will convince you of the truth of this assertion.

In the year of our Lord 274, nearly sixteen hundred years ago, Constantine the Great (the first Christian Roman Emperor), when he assumed the imperial purple was living at York in England, where his father, Constantius, died. Britain was then part of the Roman Empire. The Christian religion became established in the reign of that emperor. The Roman power, extending its government, religion and laws into all its provinces, continued in England until the year 448, nearly two centuries before it finally expired in that country. The Anglo-Saxons invaded Britain in 450, but many of the Romans and aboriginal Britons remained there, retaining their religion and many of their laws. Aylliffe says (Introduction to Parergon, p. 30), "The Saxons were not wholly destitute of religion before Gregory sent Austin into England; this is evident from the Saxons keeping Easter *more Asiatico*, which custom continued against Austin's will for fifty years after his coming into England. And it had been a miraculous ignorance had the Saxons conversed with Christian Picts and Britons above a hundred and fifty years without the least sense of their religion." In 550 the Saxons themselves were converted to Christianity, and the principles

³⁶ Crabbe's His. English Com. Law, p. 2.

of the Christian religion were interwoven into the laws of the realm. In 596 Canterbury was the see of an English bishop well endowed by royal bounty. Of course Christianity at that time was well established among the Saxons. There was an ecclesiastical council summoned by the Saxon authority in 664; and in 680 four kings of the Saxon heptarchy convened a synod at Hadfield, which received the canons of five general councils⁸⁷. The Danes attacked the Saxons in 787, more than a century after the Saxons had embraced Christianity, and the Danes themselves became Christians. In 878 the Danes were expelled by Alfred, and the Saxons obtained the dominion again. The growth of Christianity in this kingdom, says Lord Hale⁸⁸, and the reception of learned men from other parts, and the credit they obtained here, might reasonably introduce some new laws, and antiquate or abrogate some old ones that seem less consistent with the Christian doctrines; and by this means introduced not only some of the judicial laws of the Jews, but also some points relating to, or bordering upon, or derived from the canon or civil laws, as may be seen in those laws of the ancient Kings, Ina, Alfred, and Canutus, etc., collected by Mr. Lamberd.

The same learned writer says, "as exigencies and conveniences do insensibly grow upon the people, so many times there grows insensibly a variation of laws, especially in a long tract of time."

So far is the libellous charge of usurpation on the part of the judges, from being true, that the legislative and royal enactment of Christian laws may be proved from authentic documents still extant. In the case of *Swan v. Brown* (reported in the 3. Burrowes, 1598) the opinion of the court of King's Bench was delivered in 1764 by Lord Mansfield, and was afterwards affirmed in the House of Lords. It was a case upon a land title, in relation to a common recovery, and it involved a question upon the validity of certain acts done on a Sunday, or Christian Lord's Day. The origin and

⁸⁷ Ayliffe's Introduction, p. 31.

⁸⁸ His. of Com. Law, p. 138.

force of the law was traced by that learned judge. A canon was made in the year 517 that no cause should be tried on a Sunday; it was ratified by Theodosius, decreed verbatim in the capitulars of the Emperors Carolus and Ludovicus, received and adopted by the Saxon Kings (see Laws of Edward the Confessor, chapter 9), and these canons and constitutions were confirmed by William the Conqueror, when the Normans subdued England in the year 1066 and afterwards also confirmed by King Henry the Second, and so says Lord Mansfield, became part of the common law of England.

Dies Dominicus non est dies juridicus, is one of the most ancient maxims of the common law, and is a Christian maxim.

Mr. Reeves says: It is beyond dispute that a canon law of some kind had long been established in England before William the Conqueror, by the sanction of the legislature, as may be seen in Mr. Lamberd's collection of Saxon constitutions.

In Mr. Crabbe's History of the English law, page 4, it is stated that some parts of the canon law were adopted at an early period by the Saxons. The same author says in another place (page 5) usage prevailed among the Saxons in ecclesiastical as much as it did in secular affairs.

It will appear from historical works of great credit, that before the Saxons crossed from Germany into England, Christianity prevailed among the Britons, and Mr. Hume says (chap. 1), "to the disunion of counsels were also added the disputes of theology; and the disciples of Pelagius, who was himself a native of Britain, having increased to a great multitude, gave alarm to the clergy." "After this they sent into Germany a deputation to invite over the Saxons for their assistance." This was about the year 448. A contest for one hundred and fifty years ensued, and then the Saxon heptarchy was established. Ethelbert, King of Kent, introduced Christianity into his kingdom, and it extended to all the other Saxon governments. "All the other Northern conquerors, says the historian, had been already induced to embrace the Christian faith, which they found established in the empire." Ethelbert enacted with consent of the states of his

kingdom a body of laws, the first written laws ever promulgated by any of the Northern conquerors. He reigned fifty years and died in 616. Many years after this, the Saxon King Alfred converted a whole army of Danes to Christianity. He, too, framed a body of laws, as we are told by Hume, which, though now lost, was long the basis of English jurisprudence, and the origin of the common law. He died in 901. Some years afterwards, Edward the Confessor compiled a body of laws, which he collected from the laws of Ethelbert, Ina, and Alfred, and these now also lost, were long an object of affection to the English nation, and were confirmed by William the Conqueror, and also by Henry the Second. We have also Ayliffe's authority (Parergon 471) that "in England all Sundays were observed by our ancestors, the Britons. In Saxon times, King Ina and Alfred made a law preventing work on the Lord's day; and under the Danes, Canutus made a law at Winchester to the like effect."

Indeed the law books and books of history are prolific in passages directly contradicting Mr. Jefferson's calumny upon the judges; and his charge of their usurpation in this particular is founded according to my views on ignorance or dishonesty.

2. In the second proposition (towit, that Major Cartwright's proof that Christianity is not part of the common law is incontrovertible, because the common law existed while the Anglo-Saxons were yet Pagans and had never heard the name of Christ), the argument proceeds upon an assumption that nothing is part of the common law but what existed and was acted upon by the Pagan Saxons. This is wholly untrue, and so known by every lawyer. A few citations and references will convince any one of the futility of such an argument. The common law is the collected wisdom of ages, and much of it did not exist in the time of the Saxons. Mr. Reeves, in the passage before cited, says some of it was derived from the Britons, some from the Romans, some from the Saxons, some from the Danes, and some from the Normans; and what proportion from each nobody can tell. Mr.

Crabbe says (page 5), considering the gradual manner the most parts of the law have grown up, notwithstanding the several changes, the general frame of the laws has been preserved, and such additions have been made as have added much to its improvement. I have already referred to Lord Hale, and Lord Bacon. I might particularly refer to many branches of the common law wholly unknown to the Pagan Saxons, especially to those comprehensive branches including land titles, feudal tenures, mercantile law, etc. It is needless to waste your time on this topic. I shall satisfy myself with the authority of Chancellor Kent and Judge Story, who doubtless knew as much of law as Major Cartwright, who was first a navy lieutenant, and afterwards a militia major, or Mr. Jefferson, whose politics or prejudices blinded him when looking upon law questions. Chancellor Kent says, "a great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption."

In a recent publication (*Conflict of Laws*, chap. 2, sec. 24, page 25) Judge Story says, "In England and America the common law has been expanded to meet the exigencies of the times."

It is therefore clearly manifest that much of the common law did not exist in the Saxon times, and an argument based upon the assumption of Major Cartwright is founded on a fallacy; and it also appears from these historical memoranda and dates how early even among the Saxons the principles of Christianity were known, respected and interwoven into their laws and customs; nearly nine centuries before the year book of 34. Henry 6. (1453.) upon a supposed mistranslation of which Mr. Jefferson inaccurately and improperly states the whole doctrine depends, that Christianity is part of the common law.

3. The third clause of Mr. Jefferson's libel upon the judges (that they stole this law upon us, that Christianity is part of the common law), will be found equally void of foundation:

1. Because Christianity was the religion of the Roman Empire while Great Britain was a Roman Province, and many Picts and Britons were Christians before they sent for the Saxons:

2. Because the Saxons were early converts to Christianity and many of the Saxon kings with the consent of the states of their kingdoms, enacted laws (now lost, but still a part of the common law), with regard to the observance of the Lord's day, and other Christian institutions: recognizing expressly the principles of Christianity, and enforcing its precepts, a part of the common law being derived from usages and traditions growing of those very same lost statutes:

3. Because it appears from history (1. Reeves, p. 67), that parts of the canon law received the sanction of a Saxon legislature, and thereby became incorporated into the laws of the kingdom and common law:

4. Because authentic history also shows that many usages, customs, and laws of the country universally prevalent grew out of the maxims, essential principles, rules, and doctrines of the Christian religion, upon which many lost statutes were based:

5. Because Christianity having been the established religion of England for ten centuries before Sir Henry Finch published his Book of Law, in which it is said the first mis-translation occurred, on which Mr. Jefferson says the doctrine hangs, there was no necessity to steal or smuggle the doctrine upon the people; there was nothing novel in it; it had been the law for ages; nothing new was introduced by the judges; they merely declared what was old, what had been in use time out of mind before, and what was never denied, what had been long consented to by the people, and acted upon in the Courts:

6. Because had the judges usurped any legislative power, and stole a march upon the people; the King and Parliament, the lawyers and the people themselves, must have sooner or later seen it, and known it, and would have cor-

rected it, by an act of Parliament, or otherwise, and never acquiesced in a judicial usurpation:

7. Because if the fact had been so, the generations of four successive centuries would have produced some minds among lawyers, judges, or statesmen, equal to those of Major Cartwright and Thomas Jefferson, and the fact would have been discovered, and published and corrected in England itself long before the year 1824, in the nineteenth century, and not been left to Mr. Jefferson only to discover. To these reasons I will add what Chancellor Kent says of the English judges. He knew the characters and history of the whole race of them, and we may rely on his discernment and regard for truth.

"Every person well acquainted with the contents of the English reports, must have been struck with the unbounded integrity and lofty morals with which the courts were inspired. I do not know where we could resort among all the volumes of human composition, to find more constant, more tranquil and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and follow judicial history down from the first page in Dyer, to the last page of the last Reporter, we should find the higher courts of civil judicature, generally and with rare exceptions, presenting the image of a temple, where truth and justice seem to be personified in their decrees."

After such an eulogy, *laudati a viro laudato*, I think nobody will believe Mr. Jefferson's libel of their stealing anything upon us.

4. In the fourth branch of Mr. Jefferson's libel, in which he says Sir Henry Finch was guilty of a mistranslation ("a judiciary forgery"), I think he is equally in error. Who was Sir Henry Finch, and in what language was his treatise written? Did he understand the language of the year book? Could he translate his own treatise into English? Did he use fairness in placing the original passage in the year book alongside his translation? The answer to these questions will refute Mr. Jefferson's slander upon him.

Sir Henry Finch was a learned Serjeant at Law. He published in 1613, his discourse upon the law in four books, originally written in French, and afterwards by himself "done into English." His learning, style, and accuracy are

commended by Chancellor Kent, (1. Comm. 474). As he originally wrote his treatise in the same language in which the year books are written, and was celebrated as a very learned lawyer, there can be no doubt that he understood that language, and it is clear that he intended no mistranslation, because all law proceedings were then in Norman French and that dialect was well understood by all lawyers and judges of the age, and in his English translation of his book, alongside the English words "To such laws of the church as have warrant in the holy scripture our law giveth credence," he prints in the margin the very words of Prisot in the year book of 34 H. 6. 40. "*A tiels leys que eux de sainte eglise ont en ancien escripture, covient pur nous adonot credence: car ceo est common ley, surq: tous manner leys sont fondues,*" etc.

Now the question is, what do the words *ancien escripture* mean? Finch says they mean holy scripture (towit, the Bible, the most ancient of all writings, and the maxims, principles and rules derived from it and incorporated into the common law). Mr. Jefferson says this is a mistranslation, "a judiciary forgery." He declares that Prisot palpably says, "to such laws as they of holy church have in ancient writing, it is proper for us to give credence, towit, to their ancient written laws," *id est*, the ancient written laws of churchmen. Now I think Sir Henry Finch was a better scholar, a sounder lawyer and a fairer man, than he was, who accused him of mistranslation and forgery, and that

5. Mr. Jefferson's assertion that the words *ancien scripture*, as used by Prisot, do not mean the holy scriptures, and the principles, rules and laws derived from them, is manifestly erroneous. The context demonstrates this. Mr. Jefferson says "*ancien scripture*" means the ancient written laws of those of the holy church, that is, the ancient canon law or ecclesiastical laws. Now this cannot be Prisot's meaning, for his next words are, "*car seo est common ley, surq: tous manner leys sont fondues,*" for this is the common law upon which all manner of laws are founded. What common

law? Certainly not the ecclesiastical laws, limited to church discipline, etc., because the other laws were not founded upon them. Prisot expressly refers to a common foundation and origin of some of the common law and ecclesiastical or canon law, something paramount to both, towit, such laws and maxims as have warrant in holy scripture and have been incorporated into the laws of the land; his words are, "*et auxy, sri, nous sumus ogliges de conustre leur ley de saint eglise, et semblablement ils sont obliges de conustre nostre ley,*" and so, sir, we are obliged to recognize their law, of holy church, and likewise they are obliged to recognize our law. Why so? Because both laws, the canon and common law, have a common foundation and origin in many particulars in ancient scripture that is, the holy scriptures. Now I am of opinion that if there is any mistranslation, it is the wilful act of Thomas Jefferson, and not of Sir Henry Finch; and this opinion is strengthened by the marvelous fact, that no other human beings but Thomas Jefferson and Abner Kneeland's counsel have ever thought it a mistranslation, or ever said so, not one of the English lawyers who defended the several blasphemers in the English courts, not one of the English judges or text writers, not one of the American lawyers or judges.

6. In the sixth particular, Mr. Jefferson is equally unfortunate in his assertion. His language is, "we find this chain of authorities hanging, link by link, upon one another, and all ultimately upon one and the same hook, and that a mistranslation of the words 'ancient scripture' used by Prisot. Finch quotes Prisot, Wingate does the same; Shepard quotes Prisot, Finch and Wingate; Hale cites nobody; the court in Woolston's case cites Hale; Wood cites Woolston's case; Blackstone quotes Woolston's case and Hale, and Lord Mansfield, like Hale, ventures it on his own authority."

Now instead of these authorities hanging link by link on each other, only Finch, Wingate and Shepard rely on Prisot, only three links on that hook, and nothing hangs on those links, as Lord Chief Justice Hale, in his learned treatise, de-

rived his knowledge from other sources, from what was so universally known and acknowledged to be the law, so often acted upon, and so undeniable, that he deemed it wholly superfluous to cite any authorities, as we should now think it unnecessary to cite authorities to prove that a man might be sued on a promissory note for money after it was due. All the judges in Woolston's case (Lord Raymond and others) well versed in the law, knew the law to be as Hale stated it. Woolston's case was considered as sound law, and Wood and Blackstone relied on that case and on Hale; and Lord Mansfield deemed it wholly needless to cite any authorities for a principle of law so universally acknowledged. Instead therefore of all these authorities hanging on Finch's translation of Prisot's words, it is now some centuries since Finch, Wingate or Shepard have been relied upon or quoted as an authority to this point in the courts; and thus we see what the value is of Mr. Jefferson's assertion. I will add that his vain glorious challenge might safely be accepted by any member of the bar. With much self complacency he says, "Here I might defy the best read lawyer to produce another script of authority for this judiciary forgery," that is, that Christianity and religion are parts of the common law, and that offenses against them are punishable at common law; that is the point to which he challenges authority.

Now in addition to all the authorities derived from the Saxon laws prior to the Norman conquest, and all the authors I have already cited, I will refer to a book written some years before the 34th, of Henry the Sixth, when Prisot used the words which Finch translated. So far from its being any forgery to write that offenses against religion were punishable at common law, the law in that particular was settled and known before 1453, when that year book was written. Prior to 1442, Lyndwood wrote his *Provinciale*, for he died in that year. It has ever been considered as a book of great authority. It is often cited by Ayliffe and other writers on the ecclesiastical law. In the first chapter is this passage: "The proper meaning of blasphemy, when used at the common law,

appears to be an injury offered to the Deity, by denying that which is due and belonging to Him, or attributing to Him what is not agreeable to his nature." I am not certain that the book can be found in this commonwealth, but the passage quoted may be found in a note at the foot of page 396 of the fourth volume of Petersdoff's Abridgement. So here is an authority much higher up in antiquity than Mr. Jefferson's hook, on which, he ignorantly says, all the authorities hang. I believe I may now safely dismiss Mr. Jefferson and his letter from this case. It is not the only instance in which his controversial writings exhibit very little candor, fairness or love of truth. If I have succeeded in making you agree with me as to the value of his law opinions, I think the influence of his name, extravagantly lauded as it has been, will not have much effect on your verdict in this trial.

Nine months before this blasphemous libel was published, Judge Story, one of the most thorough lawyers and eminent judges in America, renowned for talents, learning, industry and integrity, attacked this opinion of Mr. Jefferson in the *Jurist* for April, 1833. The article has his initials, and has been universally ascribed to him. Mr. Jefferson's opinion therefore is also refuted under the sanction of a name much more celebrated and esteemed than his own in this department of science.

What remains then, gentlemen, but in closing the case, to suggest to you, as I proposed, some considerations why this law, at this time, and in this city should be enforced. Open brazen faced infidelity has not long been among us, nor very successful. It is said even to have been obliged to enlist as assistants in its cause, music and dancing, and by frequent balls and other enticements to collect frequently young men and women together, to instruct them that there is no God or religion to restrain their passions, and no lawfulness in the institution of marriage. I believe also, it is asserted quite publicly, that some secrets of physiology, said to be worth knowing to persons fond of certain pleasures, some checks to a too great increase of population, are now taught to the

initiated in the schools of infidelity. I do not assert these things as matters of fact, but as matters of common report, proper to be considered when persons undertake to discuss such extraordinary questions as the expediency of enforcing particular laws.

A long and high wrought description of religious persecution has been detailed to you, in which none of its horrors have been omitted. Let me present to your minds the opposite picture of the mischiefs of infidelity.

Under this indictment I should not probably be allowed to prove them, though I have the evidence; they are put to you argumentatively, and not as evidence, just as the learned counsel of the defendant argumentatively gave those tiresome extracts from history. I have unquestionably a right in urging you to a very careful performance of your duty, to put a case hypothetically to you. I may first remind you it is no new thing to bribe converts with voluptuous pleasures; and by teaching safe and easy modes of gratifying their instincts. The priests of the heathen Gods often did this; and infidelity has also the example of Mahomet, who has received so much of the gentleman's eulogy and admiration. The poisoned chalice has ever been sweetened at the brim, but the body politic finds misery and death in the contents.

Gentlemen, blasphemy is but one part of the system Fanny Wright has introduced among us. It is but one step, a fatal one indeed, still but one step in the road to ruin. It is to lead the way to atheism. The system is matured and graduated. Atheism is to dethrone the Judge of heaven and earth; a future state of rewards and punishments, is to be described as a nursery bug-bear; moral and religious restraints are to be removed by proclaiming death to be an eternal sleep; marriage to be denounced as an unlawful restraint upon shifting affections, a tyrannical invasion upon the rights of the fickle passion of love, "fond of novelty and studious of change;" and as a wicked and mysterious union cunningly devised to keep property in rich families; illicit

sexual intercourse to be encouraged by physiological checks upon conception; the laws of property are to be repealed as restrictions upon "the greatest possible good;" a community of property to be established; all children to be supported out of the common fund, that nobody need fear becoming fathers or mothers, and the horrible experiments of "New Harmony" and "Nashoba" though complete failures, these are to be introduced here as fast as possible and to pervade the world. Such are the connected objects, combined into one system by the disciples of Robert Owen and Fanny Wright. We know the experiment completely failed, which they superintended in the new Utopias in person. New Harmony very soon wore out its name and complete discord reigned there. But who can count the number of unhappy victims, whose happiness Robert Owen and his disciples have sacrificed upon the altars of infidelity? We are convinced the experiment of Abner Kneeland will also fail—it has been tried in all ages of Christianity, and has come to naught. Let it but be fairly known, and its final objects understood, and public scorn and indignation will put it down. But who can tell how much wretchedness will be suffered before his deluded adherents will become sensible of their folly, and the public toleration no longer suffer such enemies to all government to exist in its bosom?

All honest and fair jurors, who look only to their duty, who discard prejudices and partiality, will take that law for their guide, and leave constitutional questions to the decisions of the Court. They will presume the legislature to be a proper judge of its constitutional powers and that a law is constitutional, until the contrary is proved beyond a doubt. The burden of proof is on the objector.

And now, gentlemen, I leave you to do your duty. I hope I have done mine. If open, gross, palpable and indecent blasphemy, and all the consequences of the Fanny Wright system—atheism, community of property, unlimited lasciviousness, adultery, and the thousand evils of infidelity, receive no check, the reproach will not fall on me. If marriages

are dissolved, prostitution made easy and safe, moral and religious restraints removed, property invaded, and the foundations of society broken up, and property made common, and universal mischief and misery ensue, the fault will not lie on me. But you must answer for your part in bringing up that train of incalculable evils, which may be visited on your posterity to the third and fourth generations. You must answer for it to your fellow-citizens, your wives, children, and relations, to mankind, to your country, and to your God. Look then with care, gentlemen, to your great responsibility in this trial, to your duty and to your verdict. Take care that this day you offend not God, nor injure man, that you violate not the law, and the constitution; that your children rise not up in judgment against you, and that you avoid the maledictions of the world.

May 16.

JUDGE PUTNAM charged the jury, saying: Have the people a right to make laws for the preservation of the religion of the state, of civil society? . . . What government could exist without the sanction of oaths? . . . What wise government or people then, would not adopt such a system of religious belief, upon proper evidence of its truth, as a sure basis on which to rest civil institutions. . . . It is therefore the opinion of the Court, that the statute of blasphemy under which the defendant is charged, is a constitutional law, and as such is binding on the Court, the jury, the defendant, and the whole people.

At the same time, gentlemen, I am bound frankly to state to you, that the law is with you in this case as well as the evidence. The jury have a right to give their verdict, both on the law and the evidence in criminal cases. . . . You may take the responsibility of disregarding the law of the land, as laid down by the Court, but you are sworn to decide according to the evidence. . . . The Constitution says to all men who come here, behave civilly and decently, worship as you please and where you please, or stay at home and not worship at all—argue, disprove the doctrines of others, be as

zealous as you please in your own cause—all we ask is, that you should not hold up to ridicule and reproach the religion we have been taught, and which we desire our children to reverence. You may advance your sentiments, and say what you please, but do it decently; do not reproach us and make an obscene jest of religious faith.

I have attempted to explain the grounds for regarding the law as constitutional, in the plainest manner I could, though it may not be satisfactory to you. We now come to the facts, a part of the case wholly yours.

I admit that the atheist as well as any other man, has a right to hold and promulgate his opinions, and to make others believe them, if he can do so by decent discussions; but he has no right to hold up the God we worship to contempt and ridicule.

By enforcing these sanctions and requiring the external observance of reverence to a Supreme Being, the law does not infringe the rights of conscience, but protects them. It is not with a view to restrict religious freedom, or the right of any man to worship or not to worship, as he pleases, but to protect the rights of conscience in those who do believe in and reverence the Supreme Being.

It must be obvious to every reflecting mind, that a belief in God, who is our creator, preserver, and constant benefactor, who is omnipotent, just, omnipresent, to whom the night is as clear as the day, who knows all things, the thoughts of the heart before they are uttered, and whose existence is without an end—that there is a future state in which we shall exist—that God will reward virtue and punish vice, as we are taught in the old and new testaments. It is obvious, I repeat, that such a belief must have an all-powerful and pervading influence upon the hearts and conduct of men; that it must make them good in all the relations of life—good and just to each other, and faithful to the government.

An important issue between the commonwealth and the defendant, involving questions and considerations highly in-

teresting to the community, is now submitted to your determination; and before you retire to deliberate, it becomes the duty of the Court to instruct you as to the questions of law which have been discussed on the trial, and on which your verdict must materially depend. For although it is true that you have a right to decide the law as well as the fact, in this and every criminal case, where the trial is on the general issue—and are indeed bound to do so by the forms of the issue—yet in cases of doubt and difficulty you will look to the Court for instructions as to the law, throwing upon that tribunal the responsibility of deciding it correctly. . . . Its peculiar duty being to decide all questions of law. . . . It is only, therefore, when an issue of fact involves a question of law, that the jury have a right to decide upon the law; and as to the law, they are bound to receive the instructions of the Court, and to be guided by them, unless they know that the instructions given are erroneous. For if the jury have doubts as to the law, but no certain knowledge, their duty, I think, is to follow the directions of the Court; and in such cases of doubts as to the law, they would have the power, but not the right to decide against the instructions of the Court.

THE JURY DISAGREES.

The *Jury*, after being in consultation several hours, reported that they could not agree, as one of their number, Greene, would not consent to a verdict of guilty. The JUDGE therefore discharged them and continued the case to the November Term.

Nov. 10, 1835.

THE THIRD AND FOURTH TRIALS.

The fourth trial began today³⁹ before JUDGE WILDE^a of the Supreme Court. The evidence was the same but the Com-

^a Wilde, Samuel S., see 4 Am. St. Tr. 97.

³⁹ On November 17, 1834, the third trial was had before Judge Wilde and the following jurors: John Hewes, foreman; John Brown, Benjamin Burleigh, Edward Bugbee, Daniel G. Ball, Seth

monwealth was represented by *James T. Austin*,⁴⁰ Attorney General, and the *Prisoner* appeared in person.

Mr. Austin repeated the arguments made in the former trials, relying principally on the publication of the prisoner's own writing, viz.: "Universalists believe in a God which I do not, but believe that their God, with all his moral attributes (except from nature itself) is nothing more than a chimera of their own imagination."

THE PRISONER'S SPEECH TO THE JURY.

Mr. Kneeland. May it please your Honor, and you, gentlemen of the jury: After having been compelled to experience three long, and to me very tedious trials, in which I was, in my own estimation, most ably defended; but (unfortunately for me) to very little effect—after having once more heard the opening of the learned counsel for the government, in which he seems to take it for granted that I have been guilty of crimes which never entered my heart to commit, and of which he seems to expect that you will find me guilty, I am extremely happy in being allowed this day to speak for myself, touching all matters and things whereof I have been accused, and which it now becomes your province to consider. And first, permit me most solemnly to aver that I stand before you as an honest, innocent man; "that I have lived in all good conscience before God until this day;" that my moral character has not only been unimpeached hitherto, but is now unimpeachable; that I have never knowingly or intentionally injured a fellow being to the value of a single

Cole, Abiathar Cummings, Loring Dunbarr, Thomas Faxon, Thomas L. Hutchinson, John S. Jones, Lewis Munroe. The case was given to the jury on Nov. 19th at 11:14, who, after being out seven hours, returned and informed the Court that they could not agree: one juror (Dunbarr) disagreeing. They were dismissed, and the trial postponed to March Term, 1835.

⁴⁰ AUSTIN, JAMES TRECOTHIC. (1784-1870.) Born Boston, Mass.; graduated Harvard, 1802; Town Advocate (Boston), 1809; member Constitutional Convention, 1820; State Senator, 1825, 1826, 1832; Attorney General, 1832-1843. See 1 Am. St. Tr. 44.

cent, since I came to years of discretion, and within my present recollection (I believe I took an apple once from a neighbor's orchard, when I was a boy, and I got a very severe lecturing from my father even for that); and as every man, however guilty he may be, is to stand as innocent before a court and jury until his guilt shall have been established by positive proofs and incontestible arguments, I sincerely hope that both the court and jury will hear me patiently.

Gentlemen, it is not so much for myself that I shall plead, as it is for the cause of truth, in which I profess to be engaged, and the liberty of my country, both civil and religious, which I hold dearer to my heart for the sake of my children and posterity, than I do my own individual self.

I shall contend, gentlemen, that I have not, in any thing that I have either said or written, nor in any thing that I have published (save in the choice of words in point of delicacy and taste) gone beyond the bounds of fair argument, honorable criticism, or justifiable satire and ridicule. And if I can show this to your satisfaction, gentlemen, as I have no doubt I shall, then I have no fears as to the result. But if Christians, or those who call themselves such, are to be allowed the most unbridled latitude in speaking even of other Christian sects, and more especially in speaking of unbelievers whom they term atheists and infidels, and unbelievers are not allowed to meet them on their own ground, and contend against them with their own weapons, then where is the liberty of speech and of the press? It is gone, or else it never has had anything more than a mere name to live. If this be the case, in vain our fathers fought for American freedom; in vain have we attempted to rear a monument on yonder height in honor of one who fell at the very threshold of such a laudable struggle; we had better demolish than attempt to finish it, and convert its ruins into the tomb of the genius of liberty!

But, gentlemen, I hope better things of you although I thus speak, and will not even suspect your patriotism or your

discernment; and as your understandings and your consciences shall decide, so make up your minds, when you, patiently, shall have heard my defense.

As it respects the first article named in the indictment, and which so much pains has been taken to bring home to me, and to make it as it were my own, I hope I shall be able to convince you what is literally the fact, that I never knew it, and of course had no opportunity to disavow it, until my foreman, at that time, Mr. Bullard, had been summoned before the grand jury, and that the next day, or at least before my paper came out again, I was arrested; and that I did not disavow it then, because I thought it would be construed into an attempt to forestall public opinion, and to prejudice whoever might be the jury, in my favor; an act that I spurned at the very idea of doing. My counsel was of the same opinion, and I followed his advice in this particular, as he will acknowledge should he be asked the question.

As it respects the second article, I expect to show that it has been misunderstood (with all due deference do I speak it) even by the Court, on each of the former trials, and a construction has been put upon it which was never intended by the writer, and which, as I think, the words will not justly bear. And

As respects the third article, I shall prove by a document that was not introduced in either of the former trials, that I am not an atheist; that I have not denied the existence of God, or of any thing else which does in reality exist; but have professed my belief in God, and in the only true God, in the very letter, from a part which, it is now attempted to prove me an atheist; but I shall prove that I have denied nothing, nor expressed my unbelief in any thing, except what I have a right to disbelieve; and that of which any man, and every man, has full liberty to express his unbelief; for any man may express unbelief in every Christian dogma without being guilty of blasphemy.

Gentlemen, having proceeded thus far, the next thing to which I wish to call your attention, is the meaning of the

word blasphemy. For although the law which has been read to you in some measure defines it, yet the original meaning of the term as defined by the learned, will certainly, with you, have some weight, especially when I shall quote only a Christian author. Dr. Campbell, in his Dissertation, says:

"Mere mistakes in regard to character, especially when the mistake is not conceived, by him who entertains it, to lessen the character, nay, is supposed, however erroneously, to exalt it, is never construed by any into the crime of defamation. Now, as blasphemy is, in its essence, the same crime, but immensely aggravated, by being committed against an object infinitely superior to man, what is fundamental to the existence of the crime, will be found in this, as in every other species, which comes under the general name. There can be no blasphemy, therefore, where there is not an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God.

"Further, with the account given above, of the nature of blasphemy, the style of Scripture perfectly agrees. No errors concerning the divine perfections can be grosser than those of polytheists and idolators, such as the ancient Pagans. Errors on this, if on any subject, are surely fundamental. Yet those errors are never in holy writ brought under the denomination of blasphemy: nor are those who maintain them ever styled blasphemers. Nay, among those who are no idolators, but acknowledge the unity and spirituality of the divine nature (as did all the Jewish sects), it is not sufficient to constitute this crime, that a man's opinion be, in their consequences, derogatory from the divine majesty, if they be not perceived to be so by him who holds them, and broached on purpose to diminish men's veneration of God. The opinions of the Sadducees appear in effect to have detracted from the justice, the goodness, and even the power of the Deity, as their tendency was but too manifestly to diminish in men the fear of God, and consequently to weaken their obligations to obey him. Yet neither our Saviour, nor any of the inspired writers, calls them blasphemous, as those opinions did not appear to themselves to detract, nor were advanced with the intention of detracting from the honor of God. Our Lord only said to the Sadducees, Ye err, not knowing the Scriptures nor the power of God. (Matt. xxii 19.) Nay, it does not appear that even their adversaries the Pharisees, though the first who seem to have perverted the word, and though immoderately attached to their own tenets, ever reproached them as blasphemers, on account of their erroneous opinions. Nor is indeed the epithet blasphemous, or any synonymous term, ever coupled in Scripture (as is common in modern use) with doctrines, thoughts, opinions. It is never applied but to words and speeches. A blasphemous opinion, or blasphemous doctrine, are phrases (which how familiar soever to us) are as unsuitable to the scriptural idiom, as a railing opinion, or slanderous doctrine, is to ours."

I might enlarge on this subject, but it is unnecessary. I wish you only to keep this definition in mind, as I shall have occasion to revert to it again. It is the intention of the heart, and not the words spoken, that constitutes blasphemy; and I trust we shall have nothing here like constructive crimes. My opinions may or may not be erroneous; but whether they are or are not, I come not here to defend them. I only come to defend my rights and privileges, which I hold in common with every free citizen of these United States and of this Commonwealth. I shall make no attempt at any display of talents as a public speaker; for I am not accustomed to speak in such a place as this, and especially on such an occasion. I shall confine myself therefore, to plain simple facts, and such arguments and such only, as I conceive to be important and pertinent in this case.

‘Gentlemen, the general grounds of defense which have been stated, and which I shall still follow, are, “the case is not within the statute, on which the indictment is founded, and that the statute is in violation of the letter and spirit of the Constitution.”’

All will agree that I am not morally accountable for the first article, having had no knowledge of it till two weeks after it was published. This being the fact, I am no more legally accountable for that article than I am morally, unless that is attributed to me as a fault, which a high sense of honor prompted me to do; an act which, I considered at the time, and do still, as praiseworthy, that is, in not attempting to prejudice the jury in my favor. I allude to my not disavowing that article during the first trial.

But lest (what is barely, and as I conceive, hardly possible) some of you may think that I am still responsible for it in a legal sense, I am determined to look it fully in the face, and see to what it amounts. And first, as to its obscenity. If this is to be relied upon for a verdict, it should have been made a distinct charge. There is no such thing as obscene blasphemy known in common sense, whatever there may be in common law. And the idea of seizing hold of

obscenity to eke out the charge of blasphemy, or to seize hold of blasphemy to eke out the charge of obscenity, is all a mere trick, as I conceive, for the purpose of making out a kind of compound crime of two items, neither of which would have been sufficient of itself, to have constituted an indictable offense. But I deny there being any obscenity in the case. There is an indelicate word I admit; but not obscene. There is not a word in the article, except what is found in all our English dictionaries, from the largest down to the smallest of our common school dictionaries. How can such words be considered obscene?

Gentlemen, how often have your feelings and mine been mortified, by being reproached with the fact of our being the descendants of those who hung the witches; hung or banished the Quakers; and whipped or banished the Baptists? And will posterity, think ye, a century hence, think any better of us? Here we are, more than one-third advanced in the nineteenth century, trying a man, ostensibly for obscenity, but in reality for blasphemy, for having published a word, totally without his knowledge too, which is found in all our common school dictionaries; where children of all ages, and of both sexes, are not only allowed to see it, and may see it every day of their lives, but also they are there taught its meaning. What an honor this will reflect on the name and character of the grave lawyer who made out this indictment, and the equally grave judges (with all due deference I speak it) who have been so repeatedly compelled, very much against their wills as I conceive, to sit on this (what posterity will call and consider) scandalous trial; and the no less grave jury of twelve men who once pronounced the man of sixty guilty of such an offense; and the eleven others that would have done so likewise had it not been for one independent mind, who saved their names from such a disgrace. Tell it not in Massachusetts; publish it not in the streets of Boston; lest it be the means of making a thousand infidels where there is now scarcely one.

If the language here is thought to be obscene, let us com-

pare it a moment with the language which, as we are informed, God uses to convey a similar idea, and when speaking of the same organs. I quote from Deuteronomy xxiii, 1: "He that is wounded in the stones or hath his privy member cut off, shall not enter into the congregation of the Lord." Now this, gentlemen, must be considered holy language, as it comes from a book that is called holy; but if the word used here in relation to the same organs had been adopted instead of the one that is used, would you say, would any one say, that it would render the passage more refined, more chaste and delicate, or more in conformity to classic literature? The word used is the word found in all our medical authors, is derived from the Latin, and is the most refined of any word we have in the English language to convey the same idea. That I do not quote more from the book called the Bible, equally pure as the above, is not because it is not there; I could give you enough of a similar character for your breakfast, dinner and supper; yea, you would not want another meal of the kind for a week; which, were it found in any other book, a book not considered holy, would, for vulgarity, obscenity and nastiness, be enough to make the very walls of this building, could they speak, cry out

"Procul! o procul este impuri!"

In relation to all such writings, however and whenever found, I would say, "*Honi soit qui mal y pense*: Evil to him who evil thinks." It is the motive, and the motive only, that should be looked at. But, gentlemen, I forbear, and will say no more on that part of the subject.

Gentlemen, I shall next take notice of the supposed blasphemy of this article, for I believe there never has been much reliance put on its supposed obscenity; otherwise that would have been made a distinct charge. Now, what does this article say? For I have reason to believe that it has been misconstrued and misunderstood. It says (in other words, indeed, and in words that I should not have used) that the ignorant Frenchman (of whom the writer was speaking)

“firmly believes that Jesus Christ was begotten by the Holy Ghost.” The learned counsel, and even the Court may tell you that these are not the words. I grant it. This you will perceive yourselves. But it is the idea, and the only idea there communicated. Does not every one who believes in the existence of such a personage as the Holy Ghost, believe he is altogether spiritual, and not material? And if not material, is it possible that he has material organs? And if not, wherein consists the difference between saying a man was begotten without material organs, and saying that he was begotten by the holy ghost? There is a verbal difference only; but not a shadow of difference in the idea. Now, according to the strict letter of this law, is that blasphemy? No, gentlemen, it is not. It denies nothing. It curses nothing. It reproaches nothing. It ridicules nothing except a certain creed, which creed, according to my understanding, is in itself perfectly ridiculous.

Gentlemen, I am prepared to show from the Bible itself, that the text brought to support this statement about the miraculous conception, is a fraud palmed upon the Christian public by some early writer, who is palpably incorrect in his statement, whether ignorantly or wilfully, I will not undertake to say. I believe it is a rule of Court, and if I am incorrect in this, the Court will please to correct me, that when any part of the testimony of any witness is known to be false, unless it be a matter in which he might be very innocently mistaken, you are not bound to believe any thing which that witness says.

The remarks I am about to make will not apply to the whole book of Matthew, unless it be contended that the same writer wrote the whole (which I do not admit) but only to the narrative which commences at the 18th verse of the first chapter, and ends with the second chapter. In the 22d and 23d verses of the first chapter, it says “Now all this was done that it might be fulfilled which was spoken of the Lord by the prophet, saying, Behold a virgin shall be with child, and shall bring forth a son, and they shall call his name

Emmanuel." I am about to show, and shall show you with the permission of the Court, that there is no such text in any of the prophets. The text referred to is Isaiah vii, 14. But the Greek text here in Matthew is neither a correct quotation from the Septuagint, the Greek version of Isaiah, nor a translation of the Hebrew; but a palpable perversion, a falsification of both. I have here a folio bible printed in 1657. The first edition of which was printed at Antwerp in 1571. The Old Testament is in Hebrew and Latin, line for line; and the Apocrypha, and the New Testament, in Greek and Latin, in the same manner. The Latin version is by the learned Montanus, who was a Spaniard, and considered one of the most learned of his day. We are informed that Philip II. of Spain, offered him a bishoprick as a reward for his merits. Now, gentlemen, to enable you fully to understand what I wish to lay before you, I shall compare this text in Isaiah with one in Genesis (Gen. xvi, 11), where we have an account of Hagar who fled from her mistress Sarai, Abram's wife. She was met, as you recollect, by an angel, who, after some conversation, said to her: "Behold thou art with child, and shalt bear a son, and shalt call his name Ishmael." Now, I wish to inform you what I shall show to the Court, that the words in Isaiah vii, 14, are exactly the same in the Hebrew as they are in this verse in Genesis, excepting the pronoun (thou) instead of the word rendered virgin, and the proper name Ishmael, instead of Emmanuel. It is the same also, with a very little variation indeed, which does not alter the sense in the least, in the Latin. The text in Genesis is rendered, *Ecce tu prægnans, et paries filium, et vocabis nomen ejus Ishmael*. And the one in Isaiah is rendered, *Ecce virgo prægnans, et pariens filium, et vocabis nomen ejus Himmanu-el*. The only slight difference is, *et paries*, and bearest, second person singular in Genesis, and *et pariens*, and bearing, present participle, in Isaiah. But in the Hebrew there is not even this slight difference. In both texts it is pregnant, and thou shalt bear a son, and thou shalt call his name. But the text in Matthew is: *virgo in utero habebit*, a virgin

shall conceive, not is pregnant, *et pariet filium, et vocabunt nomen eius Emmanuel*. Here instead of *prægnans*, it is in *utero habebit*, instead of *et pariens*, it is *et pariet*; and instead of *vocabis*, the second person singular, it is *vocabunt* the third person plural. From all which it appears that this supposed virgin; I say supposed, for neither the Hebrew word here rendered virgin, nor the Latin *virgo*, signifies a virgin exclusively; both may signify, and often do signify, a young married woman; this supposed virgin, therefore, was pregnant in the days of Isaiah. How is it possible, in the very nature of things, that the young woman of whom Isaiah spake, could have been the mother of Jesus; or that the birth of Jesus, let his mother's conception have been ever so miraculous, could have been the fulfillment of such a supposed prophecy written in the days of Isaiah, more than 700 years before the commencement of the Christian era? 700 years, gentlemen, is a little too long for a young woman to go in that condition.

There is also a London Hebrew edition of the New Testament, published by the London Bible Society. But the translators did not dare to render this text in Matthew (i, 23), like the Hebrew in Isaiah, though they have made it nearer to it than the Greek text. I have all these texts written out in full in Hebrew, Greek, and Latin, for the satisfaction of the Court, who will correct me if I have stated any thing wrong concerning them.

This Hebrew version of the New Testament was got up for the purpose of converting Jews to Christianity. But how is it possible it can have that effect, when every Jew must perceive that here is a very important text relied on for that purpose, which has been so perverted by the New Testament writers as to make it speak quite a different language; inso-much, that the translators, in giving a Hebrew version of it, did not dare to turn it back again into the Hebrew of Isaiah? Would he not ask. Do you mean to insult my understanding with such a work as this? A work that professes to quote from my own scriptures, but which quotes the text falsely,

with an obvious view of perverting its meaning? No learned Jew, I presume, ever was or ever can be thus converted.

Gentlemen, I would not dwell upon this subject had it not been fraught with so much mischief. Rivers of blood have flowed, and the peace of all Christendom has often been disturbed in consequence of the disputes growing out of the supposed importance attached to a belief in this supposed virgin's son; and not only a belief in him, but a belief that his mother became pregnant without the knowledge of man. And here you see how such an idea has been supported for nearly, or as the clergy would have us believe, quite 1800 years; and none of them have had the learning, or if they have had the learning, they have not had the honesty to expose the fraud!

Gentlemen, what was the condition of Tamar when it was told Judah, her father-in-law, that she was with child by whoredom; and when she said to her father-in-law, "By the man whose these are, am I with child;" showing him the signet, the bracelets, and the staff? Gen. xxxiii, 25. As was her condition, so was the condition of the young woman of whom Isaiah spake; for the word is exactly the same in both texts in the Bible I have before me. What was the condition of the wife of Phinehas, the daughter-in-law of Levi, that good old man who was so frightened when he heard that the ark of God was taken by the Philistines, that he fell and broke his neck; and she, hearing of the circumstance also, and that her father-in-law and husband were dead, "bowed herself and travailed; for her pains came upon her?" As was her condition, so was the condition of this supposed virgin, excepting it is said, that the former was "near to be delivered;" and herein is all the difference. 1 Samuel iv, 19. What was the condition of Bathsheba, when 'she sent and told David, saying, I am with child?' 2 Sam. xi, 5. As was her condition, so was the condition of her whose child was to be a sign to Ahaz. But in the name of reason and common sense, how could a child born more than 700 years after Ahaz was dead, be a sign to Ahaz?

But, gentlemen, in addition to all this, I have here the fourth London edition of the New Testament, published by the Unitarian Society for promoting Christian knowledge, and the practice of virtue, by the distribution of books. In this version the whole of this narrative concerning the virgin, etc., as also that in the gospel of Luke, is printed in italics, as an indication that it is not genuine. And in Matthew there is the following note, at the end of the genealogy:

"The remainder of this chapter, and the whole of the second, are printed in italics, as an intimation that they are of doubtful authority. They are indeed to be found in all the manuscripts and versions which are now extant; but from the direct testimony of Epiphanius, and indirectly from that of Jerome (see Pope on Mir. Concept. p. 93), we learn that they were wanting in the copies used by the Nazarenes and Ebionites, that is, by the ancient Hebrew Christians; for whose instruction, probably, the gospel of Matthew was originally written; and to whom the account of the miraculous conception of Jesus Christ could not have been unacceptable, if it had been found in the genuine narrative. Nor would it at all have militated against the doctrine of the proper humanity of Christ, which was universally held by the Jewish Christians, it being a fact analogous to the miraculous birth of Isaac, Samuel, and other eminent persons of the Hebrew nation. The objection, so much insisted upon, that the authority of the Ebionites, is to be admitted indiscriminately, because their testimony is appealed to in a particular case, is trifling in the extreme. Further, if it be true, as Luke relates, chap. iii. 23, that Jesus was entering upon his thirtieth year (see Wakefield's Translation) in the fifteenth year of the reign of Tiberius, he must have been born two years at least after the death of Herod, a circumstance which alone invalidates the whole story. See Lardner's Works, vol. i. p. 432. It is indeed highly improbable that no notice should have been taken of these extraordinary events by any contemporary writer, that no expectation should have been excited by them, and that no allusion should have been made to them in any other passage of the sacred writings. Some of the facts have a fabulous appearance, and the reasoning from the prophecies of the Old Testament is inconclusive. Also, if this account be true, the proper name of Jesus, according to the uniform custom of the Jews, would have been Jesus of Bethlehem, not Jesus of Nazareth. Our Lord in the gospels is repeatedly spoken of as the son of Joseph, without any intimation on the part of the historian that this language is incorrect. See Matt. xiii. 55. Luke iv. 23. John i. 45. vi. 42. The account of the miraculous conception of Jesus was probably the fiction of some early gentile convert, who hoped by elevating the dignity of the Founder, to abate the popular prejudice against the sect. See

upon this subject, Dr. Priestly's History of Early Opinions, vol. 4, b. iii, c. 20; Pope on the Miraculous Conception; Dr. Williams' Free Inquiry; Dr. Bell's Arguments for the authenticity of the narratives of Matthew and Luke, and Dr. Williams' Remarks; Dr. Campbell and Dr. Newcombe's Notes upon the text; Mr. Evan-son's Dissonance, chap. i, sect. 3, chap. iii, sect. 2; Jones' Development of Events, vol. i, p. 356, etc.; Sequel to Ecclesiastical Researches, pt. i, chap. 7, 8.

Also in Luke, at the end of chapter i, verse 4, there is appended the following note:

"The remaining verses of this, and the whole of the second chapter, are printed in italics, as an indication that they are of doubtful authority; for though they are to be found in all manuscripts and versions which are now extant, yet the following considerations have induced many to doubt whether they were really written by Luke."

The writer of this note then goes into quite an elaborate argument on the subject, which I shall not take up time now to read.

Here, gentlemen, is not the work of some hot-brained fanatic, with more zeal than knowledge, but the work of an association of gentlemen professing to be Christians. And must we think that the Christians are all rogues, and that there is not an honest man among them? But what greater contempt by any species of ridicule or satire, can any man put upon this whole subject than is here put upon it by Christians themselves? If the whole account is spurious, as is here indicated (and not without good reasons too) as it respects its supposed divine origin, or divine authority, nothing can render it more contemptuous. And if, because an individual, believing the whole account to be a fiction, has undertaken to play off a little sarcasm or ridicule on those who are so ignorant as to believe it, must that be distorted into a blasphemous libel against God? Let this once pass, gentlemen, and there will be but an easy step after this to rekindle the fires of Smithfield. Who then can be safe? No one, except he becomes a menial servant to the ruling party.

I have said thus much on this article, not because I considered it necessary for my defense, for I am as innocent of

the publication of this article as either of you gentlemen; but I have spoken rather in behalf of others than myself, who may be so unfortunate as to be drawn into these toils. I trust, therefore, that you, gentlemen, not only in relation to this article, but also in relation to the other two, when you shall have as patiently heard what I have to say for myself as you have listened to me on this, will, by your verdict, put an eternal veto on this ill advised and altogether misdirected prosecution.

Gentlemen, I shall now call your attention to the second article in the indictment. An article which, owing perhaps a little to the coarseness of the language, and more to religious prejudice, has not been yet fully understood; or if it has been understood, and not misrepresented, I must confess I do not understand it. I regret, gentlemen, that I cannot wholly exonerate myself from this article as clearly as I have the first. But, however fatal the consequences may be to me, I will not undertake nor try to make you believe anything which is not strictly true. I am no lawyer, neither has it ever been my province to make falsehood appear like truth, or truth look like falsehood. That article is a communication from a well known writer, a gentleman of the first respectability and standing in society, a gentleman who would no more think of being guilty of blasphemy than he would of being guilty of murder. His communications have been always very acceptable; so much so, that, though I generally looked them over, they had often been put in the copy drawer without being previously examined by me. This article came just before I had occasion to leave the city, and the compositors wanting copy, this was given them without previous examination. The first side of the paper, which contains the first article was worked off before I returned. But this was handed me in slips, for the purpose of what we call proof reading, which is more for the sake of detecting any typographical errors there may be, than for the sake of understanding the article; and I do aver that it never occurred to me, no, the thought never struck me that the article contained anything that could be

construed into blasphemy, till I was shown it at the same time I was shown the other article, which was only the day before I was arrested.

Now, gentlemen, if this should be construed into blasphemy, and blasphemy in me too, is it not a hard case? Put yourselves in my situation, and then ask yourselves, would it not seem to be one of the most unfortunate and most cruel cases that has happened in these United States since the days of witchcraft? You must look there, and there only, to find a parallel. Merely for an inadvertancy, to make the most of it, a man is to be condemned for the supposed horrid crime of blasphemy.

But I contend, gentlemen, that there is no blasphemy in the case; neither was it so intended, nor will the words fairly admit of such a construction. If they will, then nobody is safe. But we must have our words all guaged by a theological measure, and all weighed in a theological balance, before it will do to utter them from our lips, or to put them on paper.

It will not do to say that both satire and ridicule are not allowable in controversy even on religious subjects. They are used by the most powerful Christian writers themselves, against other sects in whose doctrines they do not believe; they are used by all Christian sects against infidels; and why should not unbelievers be allowed to contend with Christians on their own ground, and fight their arguments with their own weapons? Yea, we have several specimens of the most keen satire we find any where, in those very scriptures called holy. What said the prophet Elijah when he tantalized the prophets of Baal about their god, in whom he did not believe? I Kings xviii. 27. "Elijah mocked them, and said, cry aloud; for he is a god; he is talking, or he is pursuing, or he is in a journey, or peradventure he sleepeth, and must be awaked." Here are exactly the words I use to Mr. Whittemore, "a god," of which I shall speak hereafter; "for he is a god;" but he is here also represented like an old gentleman who might be engaged in a conversation just at that time; or like a warrior,

pursuing his enemies; or like a traveller on a journey; perhaps he is gone to get up a revival some where, to drive women and children to distraction, and cause some to commit suicide; or he may have fatigued himself (for a god that labors must have rest and refreshment), and therefore has gone to sleep, and must be awaked! Now what must the prophets of Baal think of Elijah? Would they not consider him a blasphemous wretch? He said all this about a god in whom they believed, and whom they worshipped, and to whom they had been praying from morning till noon, saying, "O Baal, hear us!" If they had only had the law in their favor, they would have very probably said as the Jews did on another occasion, "We have a law, and by our law this man ought to die." John xix. 7. But it was not the god whom Elijah worshipped of whom Elijah spake; neither is the God spoken of in the article we are now considering, a God in whom the writer believed, nor is it the true God; and if the true God is not spoken of nor meant, then the true God cannot have been blasphemed in that article.

I am utterly surprised, gentlemen, that Christians have not perceived the predicament in which they place themselves by taking any offense at this article. What is it but a frank acknowledgment that the coat fits them? Birds do not generally flutter till they are hit. For the moment they admit that this is their God, how can they possibly avoid the point of the argument? But as the term god, like many other terms, is used in such a variety of senses, if Christians had only said, what I apprehend the most discerning Christians will say, "It is not our God who is thus represented, a God who is everywhere present, who changeth not, and is without even a shadow of turning; but the writer has raised a man of straw, a creature of his own imagination;" such an argument would have satisfied them that there was no blasphemy in the case, and at the same time it would have done the Christian cause more good than a thousand prosecutions such as this, ever will or ever can do.

It appears that the people of God have always been more

or less given to idolatry. They were so in ancient times, they are no less so now; for any object set up in the heart, or in the imagination, as an object of divine worship, aside from the true God, is as much an idol, and the worship paid to it, idolatry, as any of which we read in the Bible. In the days of Gideon, Baal had as many, and probably more worshippers than the God of Israel. He had his altars and his groves devoted to his worship. But Gideon cast down his altar and cut down one of his groves. He did not dare to do it in the day time, however, lest the people should rise against him; but he did it in the night. And when the men of the city saw it, they inquired who had done it; they undoubtedly thought that it must be some audacious blasphemous wretch; and when they ascertained it was Gideon, the son of Joash, they went to his father, saying, "Bring out thy son that he may die." But what said Joash? "Will ye plead for Baal? If he be a god, let him plead for himself, because one hath cast down his altar." Judges vi. 31. So I say to all my accusers. Will ye plead for such a god as is represented in the article we are now examining? A god, who, with any sort of sense, truth, or propriety, can be compared with such comparisons as are there stated? I need not repeat the last words of Joash, nor make the application; you will understand me. . . . The whole drift and design of that article on prayer was intended to show Parson Strong, who was then supposed to be the author of the tract the writer was examining, his error, in supposing his prayers, or the prayers of anybody else, could influence the Deity, and cause Him to do what he otherwise would not perform; to show him what a predicament such opinions necessarily place the Deity in, without the least design or intention to speak irreverently of God, much less to blaspheme His holy name. I know that the writer is not alone in this opinion, but many good and sincere Christians have the same opinions of the efficacy of prayer, viz: that it is altogether in the heart, mind, and affections of the suppliant, and not in the fountain which changeth not, and is without even a shadow of turning. But to think other-

wise; to suppose the efficacy is in the fountain—in God, what is it but to change “the glory of the uncorruptible God into an image made like to corruptible man, and to birds, and to four-footed beasts, and to creeping things.” Rom. i. 23. Why was not Paul a blasphemer for using the language I have just quoted? Because he intended it to point out what he deemed to be an error. Even so, the writer of this article on prayer used the language he did use, to point out what he deemed to be an error, not only in Parson Strong, but in many other Christians. Now suppose Parson Strong right, and the writer wrong, in point of fact, that does not make any difference as to the motive of the writer, nor render his language any more blasphemous.

But let us take another view of this subject. Suppose my constructions hitherto are wrong, and that the writer is speaking of the true God; even then, it is not he (the writer) who places God in the predicament which he states, but he complains of Mr. Strong for placing him in that predicament. His object, therefore, was to exalt rather than to debase the character of whom he speaks, which totally destroys the idea of blasphemy. We must look to the obvious and manifest intention of the writer.

Once more. Put the very worst construction upon the words you can put, and it is not blasphemy even then, according to the most rigid and strict letter of the law. The words of the statute are, “If any man shall wilfully blaspheme the holy name of God,” how? “By denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world.” Here is the law and all the law that can be brought to bear upon this article. But there is nothing in the article that does any of the above named things. There is nothing wilful or contumelious in the article. It denies nothing. It curses nothing. It reproaches nothing. But it complains of Mr. Strong and others for supposing it possible that the various and often contradictory prayers which are continually offered up to the Deity, can possibly change the divine mind, with whom we are told there

is not even a shadow of turning. This is what it is, and all that it is; and although the ideas are couched in language that I regret, as I never wish to use language that is unnecessarily offensive, yet I do not perceive wherein it is or can possibly be considered blasphemous. Nothing is clearer to my mind than the fact, that the language there used, however offensive it may be considered in other respects, is not wilful, not malicious, not contumelious, or even intended as reproachful to God, but if reproachful at all, in any sense of the word, it is only reproachful to Mr. Strong and others holding similar sentiments with him. I might quote authorities in abundance to show that professed Christians are in the habit of using similar and even worse language against each other in the heat of controversy; and if Christians will use such language among themselves, why should those who do not believe in any of their dogmas, be debarred from using language equally severe and sarcastic? It would be well, perhaps, for us all to reform in this respect, but where are we to look for the first examples? But whatever was the motive of the writer, mine in publishing that article was good; I believe the article, taken as a whole, has already done much good, and that it will still continue to do good, and that this very prosecution, only let it be continued from term to term a few years longer, will aid and assist (in a very different way from what was intended) in the laudable work. Nevertheless, if the work could go on without all this agitation on the part of the public, and suffering on my part, I should like it still better.

I think, gentlemen, that I have now set this article in its true and proper light; and having convinced you, as I humbly trust and hope I have, that there was nothing intended as blasphemous, and that there is nothing blasphemous in it, even considered in every possible light in which it can be justly viewed, I shall now call your attention to the third article named in the indictment.

This, gentlemen, is an article of my own. There is no mistake on my part about it. It means all that it was intended

to mean, and it means nothing more; notwithstanding the grand jury, or whoever framed the indictment, the attorney of the commonwealth, and even the court on the former trials, have all, not very ingenuously, as I think, tried to make it mean what was never intended by the writer, and what the words in fact do not mean. In proof of this, I shall now introduce my creed, which was enclosed in the letter sent to Mr. Thomas Whittemore, editor of *The Trumpet*, is referred to in the postscript of that letter, and would have been inserted with it, had it not been previously inserted in the *Investigator* of July 12, a copy of which I shall here also produce. This creed reads as follows:

I believe in the existence of a universe of suns and planets, among which there is one sun belonging to our planetary system; and that other suns, being more remote, are called stars; but that they are indeed suns to other planetary systems. I believe that the whole universe is nature, and that the word nature embraces the whole universe, and that God and Nature, so far as we can attach any rational idea to either, are perfectly synonymous terms. Hence, I am not an Atheist, but a Pantheist; that is, instead of believing there is no God, I believe that in the abstract, all is God; and that all power that is, is in God, and that there is no power except that which proceeds from God. I believe that there can be no will or intelligence where there is no sense, and no sense where there are no organs of sense; and hence sense, will, and intelligence, is the effect, and not the cause of organization. I believe in all that logically results from these premises, whether good, bad or indifferent. Hence, I believe, that God is all in all; and that it is in God we live, move, and have our being; and that the whole duty of man consists in living as long as he can, and in promoting as much happiness as he can while he lives.

Written at Hebron, N. H., May 24, 1833.

By Abner Kneeland.

I trust that it will not be contended that this was written after my indictment, nor can any one be made to believe that I intended to write contradictions; whatever, therefore, the letter contains, it was not intended to contradict, but that it should be construed so as to be perfectly consistent with this creed.

Now, is this creed Atheism? And can a believer in this

creed be an Atheist? Not in his own estimation, certainly, whatever he may be in the view of others.

But I contend that the letter denies nothing. It asserts nothing. It declares nothing, more than a simple expression of unbelief in some things that Universalists believe (and things that I also believed while I was a Universalist), and also other things which I believe, concerning what they believe, merely for the sake of giving reasons for my unbelief. The expression and declaration of such belief and unbelief (for no man can help believing or disbelieving according to the dictates of his own understanding, and the evidence presented to his own mind), is no more than the right of every citizen; a right guaranteed to him by the Constitution, as well as by reason and common sense, and there is no law against the free and unrestrained exercise thereof. This right, therefore, I claim; this right I have exercised, and this right I shall continue to exercise as long as religious liberty is even tolerated in this commonwealth.

Now, gentlemen, let us see what there is in that wonderful line about which there has been so much said, and which is thought to have been so blasphemous. "Universalists believe in a god which I do not; but" etc. Four things are stated in that one line, all designed and intended at the time it was written, to prevent the construction which has been put upon it. And yet it would seem that not only the learned gentleman of the law, the government's counsel, but even the court, on each of the former trials, insisted upon it that I meant what I did not intend, and what I took so much pains to guard against. I say it is misconstruction altogether.

First, observe the indefinite article a, "a god," to distinguish it from all other similar gods; for we read that there are "gods many, and lords many." Second, "god," written with a little g, and not begun with a capital, the same as in Judges vi. 31., where Joash says, "if he be a god, let him plead for himself." Third, the omission of a comma after the word god, for the purpose of showing that it was intended that the relative pronoun which, should agree with it. Fourth,

the relative pronoun which is used, instead of whom, because we do not know of what gender an imaginary god is, and it was therefore put in the neuter gender. The sentence is a little elliptical, I confess. If all the words had been expressed that are understood, or intended to have been understood in the sentence, it would have read thus: "Universalists believe in a god, in which god, I do not believe; but believe that their god," etc. Here I place a comma after the word god, in both instances. Why? Because the preposition in is thrown in before which, and the word god is repeated; hence the clause, in which god, is separated by commas from the other members of the sentence. I do not make this grammatical criticism, gentlemen, because I suppose that you stand in need of it; for whatever I may suppose you know about grammar, for some of you may not fully understand the force of my remarks, yet, judging from your appearance, I take it that you possess a good share of common sense; but it is intended for other persons (with all due deference I speak it), [turning to the court] who are in need of going to school again, and to learn anew their mother tongue.

If anything had been wanting in the first line to limit the word god to a particular sense, the word their, in the second line must surely do it; "but believe that their god," etc., evidently implying that there were other gods, and among those, the one expressed in what I call my Philosophical Creed, in which I say, "I believe that God is all in all; and that it is in God we live, move, and have our being." Now if this is blasphemy, everybody must be blasphemers except an Atheist; for all others, so far as I know, have this faith.

Yet the learned gentleman has said, after quoting the words, "Universalists believe in a God, which I do not," taking care to quote the words wrong, putting a comma after the word God, where there is none; beginning the word with a capital instead of a small g, not being aware perhaps that an idol of the imagination was meant; and ending with a period where there should have been only a semicolon, and perhaps he will tell you again; "I maintain that these words are an

unqualified avowal of Atheism, a direct and positive 'denying of God, his creation,' " etc. Perhaps, I say, he may tell you so again; though I hardly think he will; but if he should, you will duly appreciate it, and put it down for what it is worth.

Again, he says, under the second article in this letter, "He [Christ] is expressly denied, and the defendant unhesitatingly declares 'that the whole story about Him is a fable and a fiction.' " It is not so, gentlemen.

There is a wide difference between belief and assertion, or declaration; as also between unbelief and denial. I will illustrate. Some say the moon is inhabited—that there are human beings there. I do not believe it, for I have as yet seen no evidence that the moon is surrounded by an atmosphere which is essential for the support of human beings, and without which they cannot live. Is this a denial that there are human beings in the moon? Certainly not. There may be millions there for aught I know, or for aught that I have asserted to the contrary.

Now, suppose that to believe that there were inhabitants in the moon was orthodoxy; and to deny it was blasphemy, according to the law; and that this doctrine had been believed for many centuries without hesitation; but as science improved, man by the help of telescopes discovered that the moon has no atmosphere, and therefore, for human beings to live there is a physical impossibility. Hence some one should say, I do not believe that the moon is inhabited; but that the whole story about it is a fable and a fiction. He is indicted for blasphemy—and on his trial, some gentleman, learned in the law, who should happen to be the attorney of the commonwealth, should say in his argument, "The inhabitants of the moon are expressly denied, and the defendant unhesitatingly declares 'that the whole story about it is a fable and a fiction.' " What, do you think, such a man would be likely to say in his defense? Would he not be likely to think, whatever he might say, I unhesitatingly declare that the whole assertion is a lie, and if there was any motive in making the assertion, that motive could have been only to deceive? How

far the two cases are analogous, I must leave to you, gentlemen, to determine.

As to the remaining parts of this third article, as touching miracles, the resurrection, etc., etc. I am perfectly willing to submit the whole to you with a single remark, viz.: that nothing is denied here, nor in any other part of the letter; but an expression of an opinion in relation to each of those subjects in plain, simple, open, candid, and undisguised language, about the meaning of which there can be no mistake, and against which there is no law. I have done no more than to exercise the acknowledged right and privilege of each and every citizen in these United States, whether Jew or Christian, Pagan or Mahometan, of every sect, profession, and name.

Gentlemen, I have thought it necessary to say thus much to show you that the case is not, and will not be made out to be within the law. There are no facts which I have committed which the law contemplates as criminal; no facts that constitute either obscenity or blasphemy in the sense of the law. My motives, however much they may have been misrepresented, ever have been and still are good. I wage no war against that religion which James calls pure and undefiled, viz.: to assist others in need, and to keep one's self unspotted from the world.

As to the books and pamphlets published by other people, which were brought up on a former trial, and may be again, the gentleman is perfectly welcome to all the good that he can fancy such things will do his cause—all the honor that it will reflect on himself as a gentleman of his profession, or on the commonwealth under which he holds an important office. I shall not attempt to rob him or them of a single iota. I only say that those things are foreign to the subject; they are totally irrelevant to this case even were his insinuations all just, as they are not now the subject on trial. I have my opinions on all subjects relative to the moral cultivation and improvement of man, and should have no objection to express those opinions at a proper time and place; but should any attempt be made again, as possibly there may be, to assail my

private character, or that of my friends, whipping them over my back, I wish you now to understand me distinctly, as having hurled it back with perfect indignation. It is an old adage, and perhaps a true one, that the greatest thieves in a mob are generally the first to cry out "stop thief!" Let truth alone make the application. I do know, gentlemen, whatever may be said to the contrary, that my character, in every sense of the word, as well as that of my friends, stands as well and as fair in society as that of any of our accusers—and that we should lose nothing in comparison even with the best of them; and I challenge any proof to the contrary.

On the first trial several witnesses were summoned, some of whom were sworn and testified to this point; but as no attempt has been made either to invalidate their testimony, or to prove to the contrary, they have since been thought wholly unnecessary, and therefore have been omitted.

With these remarks I leave the facts with you; and I might venture to rest the whole case here, were it not for other considerations, being satisfied that the additional proof that has been offered that was not adduced on either of the former trials, and the explanations which have been given, are such as must convince every rational mind that I have not been guilty, even in a legal sense, and certainly not in a moral sense of any facts which the law contemplates as constituting the crime of blasphemy. If I have, then I contend that no one is safe.

I might here quote authorities in abundance, could I possibly think it necessary, to justify the free use of similar language to that which I have used, and language much more severe too, indulged in religious controversies by theological writers of the highest standing; but the facts are so notorious that I think it altogether unnecessary to take up your time and attention on that point. People are too apt, perhaps, to overleap propriety in the heat of controversy; but, after all, public opinion and public patronage is the best, and the safest tribunal before which such things are to be censured, condemned, and rectified. I admit that slander against a

fellow being is, and ought to be punishable by statute laws, and subject the offender to heavy damages according to the nature and aggravation of the offense; but, blasphemy against God, is something so vague and so indefinite, that it cannot with safety be subjected to human tribunals.

Gentlemen, we shall now consider the law on which this indictment is based. And first, the statute which has been read to you. Keep your minds steady upon a few simple facts, that they may not be entangled in the meshes of the net of legal technicalities and judicial decisions, all of which have grown out of the dark ages of inhumanity, religious bigotry, and cruel barbarism; accompanied no doubt with a real pious zeal for God, and often inflicted with the best of motives.

I wish you particularly to notice that simply to blaspheme the holy name of God—that is, simply to use words that may be construed into blasphemy, is not made penal according to this very statute. But the statute says, “That if any person shall wilfully blaspheme,” etc. You may be told, if this has been done in words, you are to take it for granted that it was wilfully done, that the very act itself implies malice, etc. Of this you are to be the judges, and the only judges in this case. I agree that in overt acts, where the motive is perfectly palpable and obvious, as in murder, theft, etc., the motive is to be inferred from the act itself, unless the contrary can be clearly proved. But, even there, when the contrary is proved to the satisfaction of an honest jury, namely, that there was no malice aforethought, even then, what would be otherwise murder under the same statute, becomes nothing more than justifiable homicide. Why? Because the jury are satisfied that the act of killing was done in self defense, or perhaps purely accidentally, and without malice aforethought. If this may be the case when the crime, if there be any, consists in an overt act, about which there can be no mistake as to the matter of fact, how much more when the crime, if there be any, consists in mere words, and words too, in relation to a subject about which scarcely two men can be found who think exactly alike. You are, therefore, as it is your solemn duty,

to take all the circumstances which have a bearing on this case into serious consideration, and reflect whether it be not possible, owing to the great variety of views that men may take of the same subject, and that words are but arbitrary and often imperfect signs to express our ideas; whether, I say, it be not possible that all that has been either said, written, or published, may not have been done with the best of motives. If such be the fact, which certainly is possible, and which I know is the fact, then it is not blasphemy even according to this barbarous and cruel law; a law as cruel as the laws against witchcraft—originated in the same barbarous age, has been handed down to us from the same source, and is as much a disgrace to our statute books. Should there be any doubts in your minds on the subject, those doubts should cause you to lean to the side of mercy; that is, did I stand in need of such clemency. But I do not ask for mercy, for I feel no guilt, neither am I conscious of having done any wrong that can possibly amount to a hundredth part of the crime of wilful blasphemy.

But perhaps it may be said, if I cannot be convicted by that statute law, I may be by the common law; and the spiritual courts of England may be resorted to, to prove this fact. But what have the spiritual courts of England to do with us? The people there have an established religion—a law religion, and there blasphemies, like all other heresies, were first tried and condemned in the spiritual courts, then handed over to the judiciary to be punished. But we have reason to congratulate ourselves that we have no spiritual courts here; and if our judiciaries are to be converted into spiritual courts, then we have the Inquisition established among us at once.

But take the common law as we find it, and admit it applicable here, and what then? What indeed! Why then, we have all kinds of religion here established by law; and the dominant party of what ever sect, can prosecute, and even persecute all others to the utmost rigor of the law, and all under the same statute. Yea, should Pantheists get the upper hand, then Nature would be considered the true God.

and all who should set up any other, and should preach and write against Pantheism, might be considered blasphemers and heretics, and prosecuted and punished as such, and all under the same statute. You perceive, therefore, that both the statute and common law may become, if it is to be enforced, in the hands of the ruling party, whoever may gain the ascendancy, like the flaming sword which turned every way to keep the way of the tree of life; and whichever way it may turn, it will always uphold the strong and oppress the weak. Let these precedents, therefore, be well established in this country, and you may bid farewell to your liberties both civil and religious. You may then tune all your harps to sing the requiem of American Independence—her death song, her funeral knell, for toleration and liberty of conscience will be no more.

I shall not, gentlemen, spend my own strength, nor occupy your time, by going into the mazes of the British courts, either spiritual or judiciary, nor try to ascertain whether the idea that Christianity is part and parcel of the common law originated in fraud or in fiction; whether the authorities can all be traced to one hook or many; or whether that hook be bright or rusty. These things were done, and ably done, on the former trials; they have been since the latter (now six months) before the public, and I trust that some of you at least have examined both sides of this question; but whether you have or have not, I shall mark out a straighter, safer, and much easier course for you, and show you that you need not be troubled at all with such matters. I shall not stop to inquire whether *ancien scripture* means *saint scripture*—that is, whether the Norman French for old records means the Holy Scriptures, for that is not the question; the question is, are laws which grew up in the days of ignorance, superstition and barbarism, centuries ago, in another country, and under a different form of government, now here in America, and in this nineteenth century binding on us?

If *ancien scripture* means Holy Scripture, and Holy Scripture means what is called the Pentateuch, then he who should

pick up a few sticks to make his pot boil on Saturday, which is there called the Sabbath, must be "surely put to death," and that too, by the special command of God. Numbers xv. 32. Now if you are not prepared to swallow this pill, take care how you swallow the common law of England in matters of religion. I ask, how can any law, made up from such a heterogeneous mass of materials, be enforced at the present day, as the law of this land?

The people of England could no more make laws for us, than they could live for us; neither are their laws binding upon us any further than we have adopted them; and if we have adopted their law religion, then we have adopted and nourished in our bosoms such a hydra-headed monster that nothing short of the arm of a Hercules will ever be able to destroy. But if such a religion has been adopted by judges and lawyers, as such, it never has been, and I trust it never will be adopted by the people of this commonwealth, much less has it been adopted by the free citizens of these United States.

We live for ourselves, not for the dead; and it is perfectly absurd to suppose that the laws or customs during the days of ignorance, superstition and barbarism, should now be binding on us. These things will do for lawyers to harp upon, but they can have no weight with men of sound minds, who are in possession of reason and common sense.

But even admitting (what is by no means admitted) that a law religion may be established, and has been established in this country, and that it has not been abrogated by the constitution; and admitting also that the sixty cases or more which were brought up on a former trial, and may perhaps be brought up again on this, were all correct decisions; and even then (and this, gentlemen, is what I wish you particularly to notice), it does not necessarily follow that I am guilty of blasphemy. You will perceive that in all those cases the words, both in matter and manner are very different. As, for instance, in the case at Pittsburg, Pa., where, in the heat of debate a man as it is said (but there is no knowing; for you see how words have been misconstrued in this case, and

they might have been equally misrepresented there; but it is said the man) called Jesus Christ a bastard, and his mother a — what those words would imply. Is there anything like this in my case? Not in the least.

I know it has been insinuated that the first objectionable article implies that Jesus was born an eunuch. It is not so. No such idea is either stated, implied, or insinuated. The idea is, not that he was born an eunuch, but that he was begotten by the Holy Ghost; though if he had been born an eunuch, it is no more than what Jesus himself said, according to the account, was true of some other men, if not of himself. Matt. xix. 12. But there is nothing in either of the articles complained of, that implies or insinuates that Jesus was not a proper man, and even a perfect man, unless his being begotten by the Holy Ghost would so render him. I know it is said in a human creed, he was perfect god and perfect man; two distinct natures in one person; but this is a mystery I cannot even pretend to understand—reasoning from analogy I should suppose it far otherwise; but I cannot state what I think here, lest even the truth itself should be thought to be blasphemous.

But I need not enlarge upon this subject, because, whether we appeal to the statute or common law, it is so vague and indefinite in its meaning, so uncertain in its application, and so dangerous to attempt to enforce it, that no wise and prudent juror, I am sure, will ever undertake, except in the most indubitable case, to establish such a dangerous precedent.

But lest, gentlemen, it should be said that an attack on the doctrines of Christianity, or on the doctrines supposed to be contained in the Bible, is ridiculing the Holy Scriptures, and therefore an attack on morality, and therefore an offense at common law, I shall read a few pages from the speech of my learned counsel on the former trials, on this subject.

(*Mr. Kneeland* here read several extracts from *Mr. Dunlap's* speech.)

Confucius, gentlemen, the Chinese philosopher, lived 500 years before the commencement of the Christian era; he pro-

mulgated that moral maxim which has been emphatically called the Golden Rule of the gospel, more emphatically expressed than we find it in the New Testament, namely, in these words: "Do unto another what you would he should do unto you; and do not unto another what you would not should be done unto you. 'Thou only needest this law alone, it is the foundation and principle of all the rest.'" Isocrates, also, a Grecian philosopher, who lived 300 years before the Christian era, taught the doctrine of forgiveness in these words: "You will conquer anger, if you behave yourself towards offenders as you would have others behave themselves toward you when you transgress."

How happy, indeed, it would be for mankind, if these golden rules were more observed and put in practice at the present day than what they now are. A practical application of these rules in the present case, would reflect no dishonor upon the commonwealth of Massachusetts.

But, gentlemen, I shall not enlarge upon this topic, nor go more minutely into it, for reasons already given. What I shall farther say on this point, and also on the Constitution of the United States and of the State of Massachusetts, will be but a little more than to read a few extracts from the speech which I now hold in my hand, which has already been twice delivered in my defense, in which the arguments are perfectly clear to my understanding, and I have seen nothing that either answers or refutes them.

But, gentlemen, I shall spare myself the labor of reading, and you the pain of hearing even so much as the outlines of the horrid and bloody persecutions which have disgraced the Christian name; the thought of which is enough to make the blood chill in our veins. I shall bring you by a much shorter route to the final conclusion. You have only to ask yourselves these questions: Has Abner Kneeland disturbed the public peace? That he has disturbed the peace of priestcraft may be admitted; but you must find a law which prohibits him from doing that before you can condemn, or the court can punish him for it. Has he obstructed others in their re-

ligious worship? This will not be pretended. May we not then inquire, when you hear the clamor, "Away with him," etc. "Why? What evil hath he done?" The only answer there can be given to these questions, is, "We have a law, and by our law he ought to die." John xix. 7. Remember, gentlemen, the people have a law too—and you are of the people—you represent the people—you are placed in those boxes to see that the people's law is not infringed upon. The Constitution is paramount to all law in criminal cases. You are the judges of that law, and the sole judges of that law, as well as of the facts in this case; otherwise, what is a trial by jury but a solemn mockery? You will receive the instructions the court may give you, as well as those of the Attorney General with all due respect; but they cannot judge for you, you must judge for yourselves; and you are accountable to the people and to your own consciences, which is God within you, how you discharge that duty.

Should you pronounce me guilty for an indelicate word, which crept into my paper in my absence, and without my knowledge; a word too that is in all your common school dictionaries, where your children may see it every day, and understand its meaning—why, gentlemen, the suffering may be mine, but the stigma will be yours. I have your names, and they will be handed down to posterity with all the honor, or rather dishonor that such an act can confer upon you; that is, when the subject shall be viewed as it will be, impartially, and without prejudice. On my life, I had rather be the victim than the victor in this case, provided I must be condemned.

Will you pronounce me guilty for having been so unfortunate as to have an article inserted in the paper of which I have the honor to be the editor, and in which duty I take a laudable pride in conducting according to the best of my abilities, which article was intended not to reproach anything sacred, but to ridicule a doctrine, which, as you must have perceived, cannot be fairly supported by scripture—which is altogether disbelieved by a large portion of the Christian com-

munity, and the scriptures on which it is built are supposed by many Christians themselves to be spurious, and which is altogether contrary to reason and common sense? If so, how will you be able to reconcile your verdict with the constitution? Can you then say that I am not, "restrained in my person, liberty, or estate, for my religious profession or sentiments," the very words of the constitution? Why, I have already suffered all these, to the damage of more than five hundred dollars; and but for my friends must have been already imprisoned. And even now, I am suffering a part of the penalty of the law, that of being bound to good behavior, before there has been a final decision of court against me. And this is what you call a land of freedom, of toleration, of liberty of conscience and of the press! What a solemn mockery!! What a profanation of those terms!!!

Will you pronounce me guilty of blasphemy because I have had an article published in my paper, not my own, on prayer, in which the obvious meaning of the writer was to correct what he deemed to be an error in a fellow being, in which there was obviously no intention of reproaching God, much less "contumeliously reproaching" Him? If that should be considered blasphemy, how few Christian writers will escape and how dangerous it would be to establish such a precedent! Is there not, to say the least, room to doubt? If so, that doubt should certainly operate in my favor.

Will you pronounce me guilty of blasphemy because I have honestly expressed my opinion about God, about Jesus Christ, about miracles, about the resurrection of the dead, immortality and eternal life? Have I not an undoubted right to express my belief and disbelief in relation to all these subjects? The court, on the former trial, admitted that I had such a right; that I have even a right to avow Atheism (which I say I have not done), if I only do it in decent language. I think I might challenge any one to write an article, containing the same ideas, in more decent and more respectful language than my letter to the editor of *The Trumpet*, which constitutes the third article in this indictment.

Gentlemen, look at me! What do you see or perceive in me that savors either of vice or malice? You see a man standing before you who is rising of sixty years of age; his head silvered over with the effects of sickness, of trouble, of labor, and of study; who now for the first time in his life, or under the first indictment, is arraigned before a human tribunal for a supposed high crime and misdemeanor—no less than an obscene and blasphemous libel against God. How can you suppose me even capable of being guilty of such an offense? Have I not proved to you that the God in whom I believe, lives in me and I in Him? Hence we are inseparably connected, and therefore I can no more deny God than I can deny my own existence. I can no more curse, revile, or reproach Him than I can curse myself; and were I to do either in words, it would not prove me a blasphemer, but it would prove me insane. I should be a subject of commiseration, not of punishment; I should deserve a hospital, not a prison; and ought to be put under the care of the most skilful physician, not the sheriff.

Little did those who were the cause of getting up this prosecution think where it might end. Little did they imagine that those who profess to be Christians, and Christians of high standing too, would so soon publish an article which would cause the Attorney General to be called upon, as he has been in some of the public prints, to prosecute the publisher for the same offense. But such has been the fact, as I presume is well known to you. And if you convict me, who knows but it may be their turn next?

The article in the *Christian Examiner*, for July last, to which I allude, is more clearly within the law, I think, than anything that I have published. It absolutely asserts that a great portion of the canonical scriptures are not the "Holy Word of God;" and also that Jesus Christ assumed a title and character that did not belong to him. What is this but reproaching the "canonical scriptures;" and also reproaching "Jesus Christ," or what is tantamount, of using dissimulation at least, not to say of being an impostor? But lest you

may suppose that I accuse them wrongfully, I shall give you their own words which are surely within the law, or else nothing that I have published can be so construed. But this comes from a source professedly Christian, and therefore is suffered to pass with impunity.

In speaking of the New Testament writers, the writer says, p. 343 :

"We think it consistent with the divine authority of Christ to admit, that the Evangelists and Apostles have applied the language of the prophets to persons and facts, to which in the mind of the prophets they had no relation, and this, not merely for the purpose of rhetorical illustration and confirmation, but of proving a real fulfillment of prophecy. Such an application of Is. vii, 14, is, in our opinion, made in Matthew, i, 23, and of Psalm xvi, by Peter and Paul in Acts ii, 25-31; xiii, 34-37."

Then, after going into a labored as well as learned argument to show that the Evangelists as well as Peter and Paul did not understand the language of the prophets, the writer says, p. 355 :

"The contents, then, of the sixteenth psalm are as follows: The author and subject of it, probably David, prays for help, acknowledges his dependence upon God, expresses his hatred of idolatry, his satisfaction with the condition assigned him, his confidence in divine aid to deliver him from threatened calamity, and his hopes of future protection and favor. The death or resurrection of no person is expressed or implied in the psalm.

"But we have admitted that Peter and Paul found the death and resurrection of Jesus in this psalm. Consequently we admit that they were in an error. And if so in this case, they may be so in other cases where they have used the language of the Old Testament.

"Human reason must necessarily be the interpreter of the Bible. If this reason, exercised in subjection to established laws of interpretation, bring us to conclusions different from those to which the Apostles arrived, we cannot give them up without undermining the authority of Revelation. For how do we know that we understand the meaning of any interpretation of a passage by the Apostles? How do we know, for instance, that the Apostles Peter and Paul supposed Jesus to be referred to in the sixteenth psalm? How, but by the exercise of our reason? We have admitted, what some have denied, that these Apostles did understand the psalm, as above stated. But we are not more confident of it, than we are that our own interpretation of the psalm is correct. We must bid

defiance to more numerous and weighty reasons, in order to make that psalm apply to any one but David, or one of his age, than in denying that Peter or Paul supposed Jesus to be the subject of any part of the psalm.

"The truth is, that the Evangelists and Apostles never claimed to be inspired reasoners and interpreters. Where is the passage, in which they say, 'This interpretation is true. I know it by miraculous inspiration?' They reason with their hearers in the mode prevailing at the time, as in the case of the psalm above mentioned, and thus refer the matter to the tribunal of common sense. Their arguments are not conclusive to us, because the state of opinion in the nineteenth century is different from what was the state of opinion in the Apostolic age. The Jews of that age had no correct views of the nature of language, or the principles of interpretation as has been mentioned before. The Apostles partook of the errors and prejudices of their age in things in which Christ had not instructed them. There is no evidence, nor any color of reason for the supposition, that, when Christian truth was poured into their minds, all their previous notions and prejudices were poured out."

Again speaking of the Bible, he says, p. 358:

"Men hear the Bible constantly represented as the word of God; and yet they know that it contains much which is not the word of God. Their objections fall to the ground, when the true character and use of the Scriptures are explained; when the distinction is pointed out between the revelation itself, or the word of God, and the records of this revelation, the history of those to whom it was made the accounts of its propagation, and the various arguments used by its early advocates for its defense and recommendation. It is true, that the Bible contains the word of God. It contains also many things which have no claim to that appellation. It contains probably all that could be collected at a certain period of the literature of the Hebrews, their history, poetry, ethics. Besides the word of God, it contains the words of many wicked men. It contains some unwarrantable language from the lips of pious men, such as Job (Job, chap. iii) the Psalmists (Ps. lxi, cix, cxxxvii) and Jeremiah (xviii, 21-23.) The early history of the Jews enters sometimes into disgusting details, unsuited to the taste and moral feeling of the present age. The New Testament contains histories of the life and discourses of our Divine Teacher, the acts and teachings of his Apostles, and various letters argumentative and hortatory, instructive in all ages, but specially adapted to the circumstances of the early Christians. Now when you call the contents of this whole collection of writings the word of God, or divine revelation, you assert a proposition which is not true, and which is a stumbling block to thousands. The divine authority of Christ can be maintained. The truths of his doctrines and the

obligations of his precepts rest on a foundation which cannot be shaken. They are worthy of God, and come from one whose authority was established by miracles. The correctness of all the reasonings, sentiments and statements contained in the Bible is by no means an essential part of the belief of a Christian."

This is certainly denying some part, and I should think a very great part of the Bible to be "the Word of God, or divine revelation;" but whether that is "exposing them, or any part of them, to contempt and ridicule," (which are the very words of the statute) I must leave for others to judge. Or whether Jesus acted a very honorable part in trying to make the Jews believe that he was the Messiah, "who was to come," in the sense of the Jewish prophets, I will not undertake to say; but the writer of the article before us, says, p. 360:

"Here he evidently explained to Pilate, that he claimed to be a king in the sense of being an extraordinary promulgator of the truth; in being the authoritative guide of all who are led by the love of the truth to listen to his voice and obey. We may therefore suppose that he assumed the title of Messiah in a similar sense, and that, when he affirmed that he was the Messiah, he only affirmed in figurative language, that he was the inspired teacher from God, for whose instructions the Jewish dispensation had been a preparation, and who was designed by God to fulfill his great purposes in relation to the instruction of the Jewish nation and of the world."

"Yes, I am king." In what sense? In the Jewish sense? No. In the Jewish scripture sense? No. What sense then? Why, in a totally different sense from what the Jews ever knew anything about; for "my kingdom is not of this world!" And "we may therefore suppose that he assumed the title of Messiah in a similar sense!" Now for what purpose was such an assumption, unless to deceive the Jews and make them believe that he was what he was not? For he had no right to suppose that they would understand either the word king, or the word Messiah in a different sense from what they had been accustomed to understand those words. But the writer says, p. 363:

"He might, therefore, assume the character of Messiah, though he had not been the subject of miraculous prediction."

You see, therefore, that the supposed Old Testament prophecies, as relating to Jesus and fulfilled in him, are completely given up as not relating to him, nor as being fulfilled in or by him. All rests now on the miracles of the New Testament.

Thus, gentlemen, you perceive the liberties taken, and the latitude of expression used by Christian writers themselves, which I here offer as a justification of what I have published.

Yes, gentlemen, I say as a justification; because this very article from which I have read these extracts, has been more than once complained of to the grand jury, and a bill, as I have been credibly informed, was once found against it; yet, after laying a whole month without the indictment being made out, the matter was (somehow or other) called up again, and the vote of indictment was reconsidered, and the indictment quashed. This, then, I am justified in saying, has passed the ordeal of a grand jury, and has there been justified, or at least not condemned, and therefore I offer it in justification of what I have published; for it is certainly more clearly within the law than anything I have stated. Should you convict me, therefore, may I not ask in what a sad dilemma will you place the government of this commonwealth—?—that of justifying an open breach of the law, when it comes from a professed Christian source; but of condemning a less breach of the law when committed by an unbeliever! Reflect seriously, gentlemen, before you act, what may be the consequences of such gross inconsistency.

In closing I must say, I feel more for the disgrace that this prosecution has already brought upon my native state, than all that I feel for myself, my children, or by posterity. Say what you will, posterity will view it in the same light as the most discerning view it now; that is, in the light of persecution. There has not been an argument used, nor is there any that can be used in favor of this prosecution, that could not as well be used on a trial for witchcraft. The law still exists against that impossible crime as it does against this. As many precedents, cases, and decisions, might be urged in favor of

a verdict—the common law of England could be brought in as well; the only thing against it, is, it would not be quite so popular. Is blasphemy a Bible crime? So is witchcraft; and the law is there, “Thou shalt not suffer a witch to live.” *Exod. xxii. 18.* What, I ask, but the light of science has driven all the witches out of the country? And a little more general diffusion of the same light will send all the blasphemers after them.

Gentlemen of the jury, a few words more and I have done. It is very possible that a knowledge of the fact that twelve men have already decided, and eleven more out of twelve, placed where you are now placed, were ready to decide against me, may have some weight on your minds; but recollect, you are in the possession of several important facts in relation to the case, of which they were ignorant; and that none of them had heard what I now have said for myself; it is therefore very possible that even they, were they in your places, and having heard what you have heard, would now think differently from what they thought then. One, however, thought differently; whose reasons, I trust, you have seen; or if not, some of them must have suggested themselves to you from what has now been said. I shall therefore not repeat his reasons. I wish you not to be biased by the opinions of other men, whether they were for me or against me, but to act your own judgment. Nothing remains for me now, but to thank the Attorney General, that he has permitted me to say all that I have thought it necessary to urge in my behalf; the judge for his kind indulgence; and you for giving me such a patient and attentive hearing. And if the Shylocks of my accusers, whoever they may be, insist upon it, give them their pound of flesh! I at the same time warn them that if they draw one drop of blood from the life of the Constitution, the consequences may be more serious than they at present imagine.

JUDGE WILDE charged the jury at length; the gist of his instructions was that the sentence in question relied on by the prosecution was in its obvious grammatical construction a denial of the existence of any God, but that if from the whole publication they thought that such was not its meaning, they should find accordingly;

that the wilfull denial of the existence of any God except the material universe itself was a violation of the statute, and that the statute was constitutional and valid.

THE VERDICT AND SENTENCE.

The *Jury* returned a verdict of guilty and the *Prisoner* was sentenced to imprisonment for sixty days in the Common Jail.

The *prisoner* appealed to the full bench of the Supreme Court, where, on March 8, 1836, the case was argued by Attorney General Austin for the prosecution and by Mr. Kneeland in person. On April 2 the Court (Chief Justice SHAW,⁴¹ delivering the opinion) affirmed the judgment.⁴²

⁴¹ See 1 Am. St. Tr. 443.

⁴² 20 Pick. (Mass.) 206.

THE TRIAL OF JAMES MELVIN AND OTHERS FOR CONSPIRACY TO RAISE WAGES, NEW YORK CITY, 1810.

THE NARRATIVE.

Associations of skilled workmen, known today as Labor Unions, are as old as the Guilds of the Middle Ages, and they have existed in this country since before the Revolution. But they were in their infancy for benevolent purposes only and it was not until the beginning of the nineteenth century that they began to force up wages by the power of coercion known as the strike. In New York City there existed an organization of shoemakers called The Journeymen Cordwainers. The society had on its rolls one hundred and eighty-six members. Some of its rules were most tyrannical. Every journeyman coming to the city must join the society or a strike against the shop where he was employed would follow. When he did join, he ceased, so far as his trade was concerned, to be a freeman. He could not agree with his employer as to the wages for which he would work. He could not remain in the shop if the master cordwainer employed an apprentice who was not a member of the society or employed more than two apprentices who were members of the society. If a member broke any of the rules a demand was made on his employer for his discharge and if not complied with a strike was ordered against the shop. A strike of this kind happened in 1809. The masters had the strikers arrested and tried for conspiracy to raise their wages. The case came on in the Mayor's court in 1809. De Witt Clinton was then mayor; his term was nearly ended, and not wishing to antagonize either party he twice postponed decision. In April, 1810, Jacob Radcliff succeeded him and not having heard the argument made before Clinton put off the case to a special session in July, 1810. The journeymen were then found guilty, admonished by the mayor and fined one dollar each, with costs.

The arguments of counsel on both sides were most learned and nowhere else than in the speech of Mr. Sampson is there perhaps to be found a more elaborate statement of the common and statutory law and the history of the contests between capital and labor in the legislatures and courts up to that period. The law of conspiracy as it then stood was followed by Judge Radcliff. The gist of conspiracy, he told the jury is the unlawful agreement to do an unlawful act or to do a lawful act in an unlawful way. Therefore while no man is obliged to work for wages that do not suit him and any one has a right to refuse to work until he is paid the wages he demands, yet if two or more agree with each other that they will not work except for certain wages, they may be indicted for conspiracy—for the crime consists in the *conspiring* and not in the refusal, for conspiracies are illegal, although the subject matter of them be lawful.

THE TRIAL.¹

In the Court of General Sessions, New York City, July, 1810.

HON. JACOB RADCLIFF,² *Mayor*.

HON. JOSIAH O. HOFFMAN³, *Recorder*.

NICHOLAS FISH, *Alderman*.

December 18, 1809.

On December 12, 1809, the grand jury returned into court an indictment against the following persons for conspiracy: James Melvin, William Abernathy, Thomas Baker, Henry Vane, James Glass, Daniel Allen, John Gibson, Samuel

¹ *Bibliography*. "Trial of the Journeymen Cordwainers of the City of New York, for a Conspiracy to Raise their Wages; with the arguments of counsel at full length on a motion to quash the indictment; the verdict of the jury, and the sentence of the court. Reported by William Sampson, Esq., one of the counsel in the cause. New York. Printed and published by I. Riley, 1810."

* Wheeler's Criminal Cases, see 1 Am. St. Tr. 108.

² See 1 Am. St. Tr. 61.

³ HOFFMAN, JOSIAH OGDEN. (1766-1837.) Born Newark, N. J. Jurist and third Grand Sachem of the Tammany Society. A prominent member of the New York Bar. "The associate, and

Browning, Henry Bogert, Robert Baird, John Newland, William Cosack, Robert Lambert, Terence Murray, Patrick McLaughlin, James McNinch, Wright McFarland, William Beach, James Read, John Morehouse, John Gillen, and Nehemiah Bradford.

The indictment stated that the defendants being workmen and journeymen in the art, mystery, and manual occupation of cordwainers, on the 18th of October, 1809, etc., unlawfully, perniciously, and deceitfully designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful by-laws, rules and orders among themselves, and thereby to govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, on the day and year aforesaid, with force and arms at, etc., together with divers other workmen and journeymen in the same art, etc. (whose names to the jurors are yet unknown), did unlawfully assemble and meet together and being so, etc., did then and there, unjustly and corruptly conspire, combine, confederate and agree together, that none of them, the said conspirators, after the said 18th of October, would work for any master or person whatsoever, in the said art, mystery and occupation, who should employ any workman or journeyman, or other person in the said art, not being a member of the said club or combination, after notice given, etc., to discharge such workman, etc., from the employ of such master, etc., to the great damage and oppression not only of their said masters, employing them in said art, etc., but also of divers other workmen and journeymen in the said art, mystery and occupation to the evil example, etc., and against the peace, etc.

2d count has the same general averments, and states that the defendants, designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful and arbitrary by-laws, rules, and orders among themselves, and thereby to govern themselves in (as in the first count), and unlawfully and unjustly to exact and extort great sums of

often the opponent of Hamilton, Kent, Ambrose Spencer, Emmett, Wells and other eminent jurists." Proctor, Bench and Bar of N. Y. Member State Legislature, 1791-1795, 1796-1797 and 1812-1813. Attorney General New York, 1795. Recorder of City of New York, 1808-1815. Appointed first Associate-Judge of the Superior Court of New York in 1828, retaining his seat until his death. Father of the jurist, Ogden Hoffman and of the novelist, Murray Fenns Hoffman. Washington Irving studied law in his office and was engaged to his daughter Matilda, who died before the day set for the wedding. See Nat. Cyc. Amer. Biog.; Hist. of Bench and Bar of N. Y.

money by means thereof, etc., did unlawfully assemble and meet together, and being so met together, etc., did then and there unjustly, etc., conspire, combine, confederate and agree, that none of the said conspirators, after the said day, etc., would work for any master or person whatsoever, in the said art, etc., who shall employ any workman, etc., who shall thereafter infringe or break any or either of the said unlawful rules, orders, or by-laws. Concluding as above.

3d Count. That the defendants conspired, etc., not to work for any master or person who should employ any workman, etc., who should break any of their by-laws, unless such workman, etc., should pay to the club such sum as should be agreed on, as a penalty for the breach of such unlawful rules, orders, or by-laws, and that they did, in pursuance of the said conspiracy, refuse to work and labor for James Corwin and Charles Aimes, because they, C. and A. did employ one Edward Whittess, a cordwainer (alleging that the said E. W. had broken one of such rules and orders, and refused to pay two dollars, etc., as a penalty for breaking such rules and orders), and continued in refusing to work, etc., for C. and A. until the said C. and A. discharged the said E. W., etc., etc.

4th Count. That they (the defendants) wickedly and intending unjustly, unlawfully, and by indirect means, to impoverish the said Edward Whittess, and hinder him from following his trade, did confederate, conspire, etc., by wrongful and indirect means, to impoverish the said E. W. and to deprive and hinder him from following his said art, etc., and that they, according to the said unlawful, etc., conspiracy, etc., indirectly, unlawfully, etc., did prevent the said E. W. from following his said art, etc., and did greatly impoverish him.

5th Count. That the defendants did conspire and agree, by indirect means to prejudice and impoverish the said E. W. and prevent him from exercising his trade.

6th Count. That the defendants not being content to work at the usual rates and prices for which they and other workmen and journeymen were wont and accustomed to work, but falsely and fraudulently conspiring, unjustly and oppressively, to augment the wages of themselves and other workmen, etc., and unjustly exact and extort great sums of money for their labor and hire in the said art, mystery, etc., and did meet, etc., and being so met, etc., did unjustly and corruptly, conspire, etc., that none of them should, after the said 18th of October, work at any lower rate than

\$3.75 for making every pair of back-strapped boots;
2.00 Suwarrow laced boots, full clammed;
1.75 for laced boots in front;
2.37½ for footing back-strap boots;
3.25 for footing Suwarrows;
1.25 for bottoming old boots.

On account of any master or employer, to the great damage not only of their masters, etc., but of divers other citizens, etc.

7th Count. That the defendants falsely and fraudulently conspired, etc., unjustly and oppressively to increase and augment the wages of themselves and other workmen, etc., and unjustly to exact and extort great sums for their labor and hire, etc., from their masters who employ them, did assemble, and being so assembled, did conspire, etc., that they, and each of them, etc., would endeavor to prevent by threats, and other unlawful means, other artificers, etc., in the said art, etc., from working, etc., at any lower rate than, etc. (setting out the prices in the preceding count, and concluding likewise).

8th Count states the design to form themselves into a club, as in the three first counts, and to assemble unlawfully, and that they did assemble, and being so assembled, conspired and agreed that none of them should work for any master who should have more than two apprentices, to learn the said art, at one and the same time.

9th Count charges a conspiracy by indirect means to prejudice and impoverish the following persons, who are all master shoemakers and prosecutors of the indictment: Israel Haviland, John Mills, Timothy Wood, John Peshine, Oliver H. Taylor, William Trowd, Isaac Minard, Samuel Mabbatt, Thomas Lewis, James Corwin, John I. Vanderpool, Christian Vovenhoven, William Kidney, Thomas Benton, David Law, Jr., Abraham Merril, Charles Lee, Thomas McKinley, James Jarvis, Charles Aimes, William Benton and Peter Spranger.

The defendants being in court pursuant to their recognizances were called upon to plead, before DE WITT CLINTON,⁴ Mayor of New York and PETER A. MESIER and THOMAS CARPENTER, Justices of the Sessions.

Mr. Sampson moved to quash the indictment. He and *Mr. Colden* made lengthy arguments and were followed by *Richard Riker*,⁵ District Attorney and *Mr. Emmett*, for the People.

June 10, 1810.

The case coming up at the April Term for decision, Mayor Clinton being absent, the two Justices not agreeing in opinion, no judgment was given, and the defendants were bound over to appear at

⁴ CLINTON, DEWITT. (1769-1828.) Born Little Britain, N. Y. State Senator, 1799. United States Senator, 1802. Mayor of New York City, 1803-1810. Governor of New York, 1824-1827. Died Albany, N. Y.

⁵ See 1 Am. St. Tr. 360.

the June Term. In the meantime Mayor Clinton had gone out of office, and today the cause was continued to a special session to be held July 12th.

July 12.

No judgment being possible on the former motion to quash on account of the divided court, the counsel for the defendants decided to renew it and the defendants being called pleaded *not guilty*.

*Ebenezer Griffin*⁶ and *Thomas A. Emmett*,⁷ for the People.

*William Sampson*⁸ and *Cadwallader D. Colden*,⁹ for the Defendants.

The following jurors were sworn: David Wagstaff, John Johnson, James Welsh, William L. Lawrence, Augustus Nicoll, John Ashfield, David Cargill, John W. Livingston, William Brodill, Joseph Dederer, John Queen, Robert Graham.

As the jurors came to the book, they were asked by *defendants' counsel* whether they were master shoemakers, and, also, whether they were masters or employers in any of the mechanic arts or trades, but none such appearing, they were all permitted to be sworn without farther objection.

Mr. Griffin put a question to a juror whether he had not made up his mind upon the subject of this trial. He said he had no knowledge of the particulars of this case, and therefore could not have made up his mind. John Johnson, another of the jurors, said that he had so far made up his mind that he could see no reason why journeymen should not meet to regulate their own demands as well as other men. *Mr. Griffin* challenged him for favor. The three jurors first sworn, viz.: James Welsh, John Ashfield and David Cargill, were sworn, to try whether the said John Johnson was an indifferent juror between the parties or not.

David Codwise, counsellor at law, having been seated opposite the jury box, was called and sworn to testify to the words of Mr. Johnson. The People withdrew the challenge and the juror was sworn.

John Queen was also challenged for favor. The ground of challenge to Mr. Queen was that his brother, who was now absent from the city, had been, during his residence here about six months ago, a member of the Society of Journeymen Cordwainers, and that he

⁶ See 1 Am. St. Tr. 790. Mr. Colden had since the last argument been appointed District Attorney, but not feeling at liberty to change sides, Mr. Griffin was appointed special prosecutor.

⁷ See 1 Am. St. Tr. 63.

⁸ See 1 Am. St. Tr. 63.

⁹ See 1 Am. St. Tr. 6.

might still be understood to be a member; if so, the penalties would fall upon him, provided the acts of that body were held to amount to a conspiracy, and for that reason his brother could not be an impartial juror. The same *triors* were sworn. Two witnesses, Thomas Wilson and George Gould were examined in chief. The counsel summed up the evidence and the *triors* found *Mr. Queen* an indifferent juror between the parties; he was accordingly sworn.

The COURT imposed fines on several persons summoned as jurors for their non-attendance, and adjourned the trial of the indictment till 10 o'clock on the following day.

The jury sworn were permitted to go at large by consent of the parties; the COURT first admonishing them of their duties, and of the necessity of shutting their ears to all conversations touching the subject they were sworn to determine upon.

July 13.

William Benjamin. The rules of the society are contained in the constitution printed in 1805, and afterwards re-enacted. The original is in the hands of John Baker, the secretary. The printed constitution I have here is a copy of it:

We, the Journeymen Cordwainers of the City of New York, impressed with a sense of our just rights, and to guard against the intrigues or artifices that may at any time be used by our employers to reduce our wages lower than what we deem an adequate reward for our labor, have unanimously agreed to the following articles as the Constitution of our Society.

Art. I. That this Society shall consist of a President, Secretary and three Trustees, to be elected annually; and a Committee of six members, to be chosen every six months.

Art. II. The election for President, Secretary and Trustees, shall take place on the third Monday in January, annually, at the usual place of meeting, and they shall be respectively chosen by ballot, by a plurality of votes of the members present; and the Committee shall be chosen the third Monday in January and the third Monday in July.

Art. III. The President, in order to preserve regularity and decorum, is authorized to fine any member six cents, that is not silent, when order is called for by him, and all members are to address the chair one at a time.

Art. IV. Any person becoming a member of this Society shall pay the sum of forty-three and a half cents on his admission, and six and a quarter cents as his monthly contribution; and should any member leave the city at any time and stay for the space of three months or upwards, if on his return it can be proved that he has been so absent, he shall still be deemed a lawful member by paying one month's contribution.

Art. V. All the money collected in this Society shall be delivered into the hands of the Trustees, and they shall hold an equal

share till it amounts to fifty dollars; they shall then deposit it in the United States Bank, and it shall not be drawn on except in case of a stand out, and then left to a majority of the society.

Art. VI. The secretary shall keep a regular account of all the proceedings of this Society, and he for his services, shall receive one dollar per month, and twelve and a half cents for each notice served on any member.

Art. VII. The President, Secretary and Committee shall meet on the second Monday in each month, to consult and propose any measures they may think beneficial for the Society, who shall assemble on the third Monday in each month, at the hour of seven o'clock from September to March, inclusive, and at the hour of eight o'clock from March to September, and for non-attendance of President and Secretary, to pay a fine of fifty cents, and any member of the Committee to pay a fine of twenty-five cents.

Art. VIII. No member of this Society shall work for an employer that has any Journeyman Cordwainer, or his apprentice in his employment, that do not belong to this Society, unless the Journeyman come and join the same; and should any member work on the seat with any person or persons that has not joined this Society, and do not report the same to the President the first meeting night after it comes to his knowledge, shall pay a fine of one dollar.

Art. IX. If any employer should reduce his journeyman's wages at any time, or should the said journeyman find himself otherwise aggrieved, by reporting the same to the Committee at their next meeting, they shall lay the case before the Society, who shall determine on what measures to take to redress the same.

Art. X. The name of each member shall be regularly called over at every monthly meeting, and should any member be absent when his name has been called over three times successively, shall pay a fine of twelve and a half cents for the first night, twenty-five cents for the second, and fifty cents for the third; and if absent three successive meeting nights, the Secretary shall deliver him a notice, and if he does not make his appearance after being notified on the following meeting night (unless he can assign some just cause for staying away), shall pay a fine of three dollars.

Art. XI. Any Journeyman Cordwainer coming into this city that does not come forward and join this Society in the space of one month (as soon as it is known), he shall be notified by the Secretary, and for such notification he shall pay twelve and a half cents; and if he does not come forward and join the same on the second meeting of the Society, after receiving the notice, shall pay a fine of three dollars.

Art. XII. Any member of this Society having an apprentice or apprentices, shall, when he or they become free, report the same to the President, on the first monthly meeting following; and if the said apprentice or apprentices do not come forward and

join the Society in the space of one month from the time of the report, shall be notified by the Secretary, and if he does not come forward within two months after receiving the notification, shall pay a fine of three dollars.

Art. XIII. There shall be delivered to the President at every monthly meeting a sufficient sum of money to defray the necessary expenses of this Society.

Art. XIV. If any member should be guilty of giving a brother member any abusive language in the society room during the hours of meeting, who might have been excluded from this Society by his misdemeanor, but by making concession have been reunited, he shall pay a fine of twenty-five cents.

Art. XV. Every member of the Society shall inform the Secretary of his place of residence, and should they at any time change their place of residence, they shall notify the same to the Secretary on the first monthly meeting following; not complying with this, shall pay a fine of twenty-five cents.

Art. XVI. Any member may propose as amendments to this constitution new articles or alterations of those in force, which proposed amendments must be delivered to the Committee in writing, who shall present the same to the Society at their next monthly meeting, and if two-thirds of the members present concur therein, such amendment shall become a part of the constitution.

Art. XVII. It is the duty of the private members to attend the meetings and co-operate with its officers in promoting the welfare of the Society, for in doing this, they will recollect they are promoting their own individual welfare.

A LIST OF WAGES

For the Journeymen Cordwainers

IN THE CITY OF NEW YORK.

Agreed to on the First Day of March, 1805.

Back Strap Boots, fair tops.....	\$4.00
Back Strapping the top of do.....	.75
Ornament Straps closed outside on do.....	.25
Back Strap Bootees	3.50
Wax Legs closed outside, plain counters, fair tops	3.25
Cordovan Boots, fair tops.....	3.00
Cordovan Bootees	2.50
Suwarrow Boots, closed outside.....	3.00
Do. inside closed, bespoke.....	2.75
Do. do. inferior work, do.	2.50
Binding Boots25
Stabbing do.25
Footting Old Boots	2.00

Foxing New Boots50
Foxing and Countering Old Boots	2.00
Do. without Counters	1.75
Shoes, best work	1.12
Do. inferior work	1.00
Pumps, French edges	1.12
Do. Shouldered do.	1.00
Golo Shoes	1.50
Stitching Rans75
Cork Soles50

Mr. Benjamin. On several occasions measures had been taken to give effect to the constitution, or rules, by giving notices to masters having journeymen or apprentices in their employ not members of the body, viz.: for having more than two apprentices, or employing apprentices other than those of the members who had infringed their rules. The notice in such cases was, that if they persisted to employ such persons, etc., or to disregard the rules of the body, their shop would be deserted by all the workmen of the society. This had been in some instances effected by means of what they called a strike against the shop, and the offending member was then termed a scab, and wherever he was employed no others of the society were allowed to work. There was a strike against the shop of Corwin & Aimes, but as it appeared to the society that they contrived to defeat its operation by privately getting their work done at other shops, the society in November, 1809, ordered a general strike against the masters. There were one hundred and eighty-six members, and about as many journeymen who were not members, but all of the best workmen were of the society. Never knew of but one general turn

out, and had been fined and threatened for working against the rules of the society.

Cross-examined. I came voluntarily into the society; on the question of a general turn out, the members voted by secret ballot, and no compulsion is used, but every man votes according to his inclination, the majority carries it, and then it becomes a law, and the contraveners of it are scabbed.

Edward Whittess. Worked for Corwin & Aimes about four or five years; joined the society about six or seven years ago; was fined at different times, and at the time of the general meeting there was a rumpus in the society, which, with the multiplicity of the fines, determined me to leave it and change my occupation, and take to cramping boot legs. While a member I acted as sexton of a church, for which I had sixty dollars yearly. This prevented my attendance and occasioned me sometimes to be fined. During this time I was first scabbed, my employer was obliged to discharge me until I paid my fine and was reinstated; came voluntarily into the society, and remained in it six or seven years.

Mr. Aimes. I received several notices, one to discharge Whittess, which I complied with;

another to discharge a boy, an apprentice of Britton, who had worked with me two or three years. I thought it a great hardship that the old man should lose the profit of the work of the apprentice he had instructed and did not discharge him, for which the body struck against him.

Cross-examined. Had contributed some money towards carrying on this prosecution.

James Britton. After I had instructed my apprentice, whose work was my chief support, being myself in years, was deprived of that help by the influence of the body of which I was not a member.

The *defendant's counsel* offered to show, as well from the witnesses on the part of the prosecution, as from other witnesses whom they should call, that long ago, prior to the strike or turn out, there was a combination of the masters for the express purpose of lowering the wages of the working men, and which was oppressive to them; and that their society originated in the necessity of protecting themselves against such combinations; and further, that the masters were now in combination for the purpose of this prosecution.

This was objected to and overruled by the COURT upon the ground that the misconduct of the masters would be no justification of the defendants.

Mr. Colden. We then offer to show it as evidence in mitigation.

The COURT. If there were circumstances merely in mitigation of the sentence, they would come more properly in affidavit in case of conviction.

Mr. Colden. We will show that the wages and rate contended for and demanded by the journeymen were reasonable and no higher than to afford them a bare maintenance.

The COURT. The evidence is not relevant because none has appeared on the part of the prosecution to show that unreasonable or extravagant demands had been made. It is therefore irrelevant to rebut what has not been proved.

Mr. Colden. We propose to prove that the masters made an excessive profit on the labor of the workingmen. The COURT. This is refused upon the former ground that the misconduct of the masters would not justify a conspiracy or illegal combination in the journeymen.

MR. SAMPSON, FOR THE DEFENDANTS.

Mr. Sampson. Gentlemen of the jury: The difficulties under which I labor, are beyond my force, and I am conscious that entering upon an argument of such a nature, under such disadvantages, is a forlorn endeavor. The evidence does not in any shape alter the principles upon which I argued six months ago, for the quashing of the indict-

ment. That argument was addressed to a court of law, and founded upon the law, supposing all the facts charged in the indictment to be proved. Nothing, certainly, has come out in evidence to prejudice the defendants, for there was not a single instance of violence or disorderly conduct, and it is conceded, that the demands of the workmen are not unreasonable or extraordinary. The single question is whether the law of England is to govern this case. I am aware how far the doctrines of the English law upon this head unfortunately give a bias to the judgment of many individuals; and no doubt, some of those whom chance has arrayed to sit in judgment on this case, must be presumed, however honorable and intelligent, to have imbibed more or less of that opinion. The jury, it is true, are judges of law and fact in criminal cases, and the arguments necessary to disentangle the question from such preconceived notions, must be of a nature too prolix and arduous to be offered, with a fair prospect of success, to a jury already exhausted and fatigued by a painful sitting, at a season when the powers of mind and body languish. In the former argument, I found it necessary to turn over many volumes in order to show grounds for my opinions, and to cite numerous cases which it would be impossible now, at candle light, with sight so fatigued, and faculties so exhausted, and in a state of health so ill suited to exertion, to resort to. The very circumstances of my having undertaken to report the former arguments, with all the tiresome labor of transcribing, compiling and correcting for the press, had effaced the livelier impressions of first conceptions, and must impart to what I shall offer the vapid insipidity of a tale twice told. The many books already referred to, and now produced by the opposite counsel, seemed to forewarn us that they mean to renew the learned efforts of the former contest.*

* *Mr. Sampson*, taking up his former argument, read the authorities from the printed report, but omitted much the greater part from unwillingness to fatigue the jury. To make the case complete his complete argument on the motion to quash is included here.

The indictment we moved to have quashed contains nine distinct counts, each affecting to charge the defendants with a substantive crime of conspiracy; yet we maintain, that, taken in the entire, it contains nothing to which we should be put to answer, either in law or fact.

We understand, from the counsel for the prosecution, that they mean to support the indictment, without reference to any statute, but abstractedly upon the principles of the common law. On the other hand our positions are these:

That by the common law, in England, such combinations were never held to be conspiracies. That even though they had been, they never were so in this country, either by statute or common law. That in England such indictments lie only in virtue of the statutes regulating the wages and labor of the workmen, called Statutes of Laborers. That such statutes were never in force in the United States of America, not when they were colonies, and certainly not since. That the crime of conspiracy is defined by a statute declaratory of the common law, as well in this state as in England, and that under that definition, no such indictment as the present can be maintained. That negative usage, from the first settlement of this country to the present time, is sufficient evidence to show, that the law never authorized such a proceeding.

The definition alluded to is entitled "A Definition of Conspirators,"^{9a} and takes in the three kindred offenses of conspiracy, champerty, and maintenance, which make a common title in all the ancient books, all partaking of the same nature, and punished as *crimina falsi*, with the villanous judgment.

The English statute is in these words:

"Who be conspirators and who be champertors."^{9b} Conspirators be they who do confederate, or bind themselves, by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously, to indict, (2) or falsely to maintain pleas; (3) and such as cause children within age to appeal men of

^{9a} 33 Edw. I. stat. 2 an. dom. 1304.

^{9b} Vid. Keble, stat. p. 69.

felony, whereby they are imprisoned, or sore grieved; (4) and such as retain men in the country, with liveries or fees, for to maintain their malicious enterprises; and this extendeth as well to the takers as the givers; (5) and stewards and bailiffs of great lords, which, by their seigniory, office, or power, undertake to hear or maintain quarrels, pleas or debates, that concern other parties than such as touch the estates of their lords, or themselves. (6) This final ordinance and definition of conspiracy, was made and accorded by the king and his council in his parliament, the 33d year of his reign.* (7) And it was further ordained, that justices assigned to the hearing and determining of felonies and trespass, should have transcript thereof. (8) Champertors be they that move pleas and suits, or caused to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land at variance, or part of the gains."

It appears from the seventh section, that this definition applied as well to criminal prosecutions as to civil. It was, therefore, the universal definition of conspirators and conspiracy.

Immediately after follows the statute of champerty, restraining pleaders, attorneys, bailiffs of great men, etc., from corrupt bargains and oppressive acts, of which the fourth section is in these words:

"(4) Our lord the king, at the information of Gilbert Rowberry, clerk of the council, hath commanded, that whoever will complain himself of conspirators, inventors and maintainers of false quarrels, and partakers thereof and brokers of debates, that Gilbert Thornton shall cause them to be attached by his writ; and that they be before our sovereign lord the king, to answer unto the plaintiffs by this writ following: *Rex vie salutem*, etc."

From this it appears how far those have straggled from the common law principles, who have supposed, that a combination of men, to regulate their immediate and proper interests, was included in that odious accusation by the common law.

The earlier statutes made *in pari materia*, antecedent to this final definition of what should and should not be conspiracy, all warrant the same principle, and all turn upon falsehood, oppression by false charges, or corruptly meddling with concerns not their own: for instance:

"None shall commit champerty for to have the thing in

question.”⁹ This title is sufficiently explanatory. “Penalty for buying the title of lands depending in suit.” This was to prevent the chancellor, treasurer, justices, great lords of the king’s council, and such as had power, from taking churches, advowsons of church lands, and other bribes, for the corrupt abuse of their power, and perversion of law and justice. “The remedy against conspirators, false informers, and embracers of juries.” This empowered justices of assizes to take inquest without writ, and do justice without delay, upon conspirators, false informers, and evil procurers, of dozens, assizes, inquests, and juries. And next is that final definition, already cited, of which Lord Coke speaks in these terms. “This, which was in truth the 21 Edw. III. is entitled a definition of conspiracy, and is in affirmance of the common law.”

The counsel opposed to us are able counsel, and can do much, but to bring the case of the journeymen cordwainers of New York within this definition of conspiracy, upon the principles of the common law, I think is more than they can do.

But what will they say when I read to them a similar definition by a statute of our own, made with a full view of all the English cases and statutes from the time of Edward I. and before it, where our legislators, after weighing them all, thought the best thing they could do was to go back to the old common law definition, and re-enact it; and thereby get rid at once of all the bad precedents with which the English books abound.¹⁰

The declaratory statute of New York is, as close as circumstances would permit, a transcript of the English final definition, “*Reddendo singula singulis* :” it is the same law. It only omits what respects great lords, and their men in livery, and such other mischiefs as were supposed for ever banished from this land. I leave this statute open for the perusal of the gentlemen, with this one remark, that, when all the English statutes were repealed in mass, this protecting law was adopted and enacted.

¹⁰ Laws N. Y. v. 1, p. 343, sess. 24, c. 87.

It is scarcely more necessary to say, that a definition of what shall be conspiracy is a declaration of what shall not be so, than that the line of circumference shows as well what is contained within a circle as what falls without it. The acts here charged fall without, and not within, the definition.

We have, therefore, for our maxim, that, *ubi nulla lex, ibi nulla transgressio*. We have also for us a definition, from high authority, of crimes and misdemeanors.

"A crime or misdemeanor," says Sir William Blackstone, "is an act committed, or omitted, in violation of some public law, either forbidding or commanding it." Let me then ask, where is the public law that prohibits anything, or commands anything, which these defendants are charged with having committed or omitted? The silence of our statutes, the silence of our records, shows that there is none; and the definition in affirmance of the common law, shows that there could be none; and that even in England, there never was any other than those statutes of laborers, which it is not pretended ever were of force in this country, and which are all repealed if they ever had been in force here.

Yet from the frequent recurrence of those statutes in the English law books, and of the cases growing out of them, has all the fallacy arisen. By too great familiarity with foreign law books, and too little attention to our own constitution and laws, we are often led into error, not considering how unsuitable these foreign laws may be to our condition. For instance: the English code and constitution are built upon the inequality of condition in the inhabitants. Here all are in one degree, that of citizens; and all equal in their rights. There are many laws in England which can only be executed upon those not favored by fortune with certain privileges; some operating entirely against the poor. There one man is sovereign, and all others his subjects. Here no man is subject, and no man lord or master. Why should we, then, take lessons of prosperity or felicity from other countries. If they do not take them from us, let us at least remain contented with

our own institutions, and wean our affections from such as are of no kin nor profit to us.

But how strangely are men the creatures of education and habit. At the same time that we have shaken off the supremacy of the English law, we imbibe its errors with our mother's milk. And the remarks of the profound and perspicacious Adam Smith, are realized here as in Great Britain. There, he observes, the master tradesmen are in permanent conspiracy against the workmen; so much so, that it passes unobserved as the natural course of things, which challenges no attention. Even so we see it here. These masters enter without fear into a sordid combination to oppress the journeymen; and if the workmen meet in opposition to them, they forthwith sound the alarm, and spread the cry of treason and conspiracy.

The difference, however, is, that in England there are statutes to warrant such prosecutions. Here there never were any such. There, there are precedents: here, there are none. But those precedents in England are not founded on the common law, but by statute, and in counteraction of it: and the proof is, that not one such case is to be found in any book of reports, treatise, abridgment or tables, till the passing of the statutes of laborers, which gave rise to them; and the first of which was in the reign of Edw. III. And I call upon my adversary, that great legal antiquarian, my learned countryman, who lives amongst the old fathers of the law, who estranges himself from his friends, his wife, and lawfully begotten children, to haunt with such musty companions. I call upon him who spends his mornings with Sir George Croke, and Sir Harbottle Grimstone, and his evenings with the *Mirror of Justice*, and *Javaise of Tilbury*, to tell me of any case of this nature prior to those statutes. If he cannot show when it was attempted, then it never was attempted. I challenge him now to do it, and I put the issue of this motion on the chance.

And what were those statutes out of which these prosecutions grew? They were the lineal descendants, the lawful and immediate issue, of pestilence and public calamity, and they do not hide their origin; for by them, and their consequences,

the most useful class in England is rendered the most miserable, and grows poor as its oppressors grow rich. Throughout the habitable world, luxury, vanity, and even fancy, is satiated by the productions of their industry; but, like the worm that spins its bowels, and perishes in the act, so they whose hands impart to the tissue its lustre and its hue, to flatter the voluptuous and the gay, pine themselves and decay in obscurity and want. And a late tourist has too justly remarked, that, from poverty and pain, the workmen in certain manufacturing towns in England, exhibit the strange phenomena of green hair and red eyes!¹¹

It is these statutes, and the prosecutions grounded on them, that drive the artizan to emigrate as often as he can escape from the laws which make his country his prison, and has intelligence enough to know that there is a better. It is owing to that system, that, in a nation expending thirteen millions sterling yearly upon instruments for the destruction of men, one million out of nine are beggars receiving alms!!! And are these the benefits the prosecutors are now, for the first time, about to visit upon our happy community?

Mr. Reeves in his valuable history of the English law, thus introduces these statutes:

"The next parliamentary regulation relating to the clergy was statute 36, Edw. III., stat. 11, c. 28, which was occasioned by the late plague that had depopulated the church as well as the laity. The priests having from thence taken occasion to make high demands for their services, certain limits were fixed by statute for the attendance of parish and other priests."

He then passes from the priests to the laborers, who, it seems, were no better after the plague than the priests.

"This public calamity having thinned the lower classes of the people, servants and laborers took occasion to demand very extravagant wages. An ordinance was therefore made by the king and council to whom it was thought properly to belong, as an article of police and internal regulation, especially as the parliament were prevented from sitting by the violence of the plague. This ordinance was afterwards made an act of parliament and constitutes the statute 23, Edw. III. The contents of this statute

¹¹ Espriella's Letters.

are worthy of notice, as they are the first provisions of the sort, and the foundation of the system to which the community were subject for many years after."

Thus, whether we judge of these statutes their origin or their effects, they may be useful lessons to warn us from the adoption of similar wickedness and folly. The sequel will show how one false principle generates a multitude of others. "Because it was found," adds the author, "that people would not sue for the forfeiture against servants and workmen taking more than the above-mentioned wages, it was afterwards ordained that such forfeiture should be assessed by the king's officers." The moral then is this: the laws were oppressive: the people revolted against them: and arbitrary courses were invented to enforce them!

"In the 25th year of the king, the commons complained, in parliament, that the above ordinance was not observed, wherefore a statute was made ordaining further regulations on the subject. It was enacted, that carters, ploughmen, and other servants, should be allowed to serve by the year, or by some other usual term; and not by the day. All workmen to bring their implements openly into town, and there be hired in a common place, and by no means in a secret one. Certain prices were fixed for a day's work of mowers, reapers, and others. Servants to be sworn twice a year, before the lords, bailiffs, stewards, and constables of every town. And those who refused to take such oaths, to perform the work they engaged for, were to be put in the stocks, by the above officers, for three days or more, or to be sent to the next gaol, there to remain till they would justify themselves. Artificers who absented themselves from their work were to be branded with a hot iron on the forehead, with the mark of the letter F to denote the falsity they had been guilty of in breaking the oath by which they had bound themselves, according to the former statute to serve."

Were the gentlemen aware of this history when they brought forward this prosecution? Would they introduce into this country, any part of a system, under which men were baited like wild beasts; their limbs put in the stocks; their souls put to the torture, that they might be forced to swear against their interest and their conviction, on pain of branding, dungeoning, pilloring, ear-cutting, and nose-slitting. Much better did those lawgivers themselves deserve branding with the letter F for making such laws. If

perjury was committed, it was they who were guilty, and deserved to suffer for it, for, in such case,

“Tis he who makes the oath that breaks it,
Not he that from compulsion takes it.”

Further:

“A servant, laborer, or artificer, who had absented himself, might be demanded by the mayor or bailiffs of the place. If they refused to deliver him up, they might go before the justices of laborers. This was to prevent such fugitives from being harbored, and to interest all persons in the execution of this statute.”

So here we find, that neither the secrecy of retreat, the charity of his fellow-creatures, nor the benignity of the magistracy, was a refuge to the victim, against the cruelty of his pursuers.

“In the following reign,” continues the author, “these statutes were confirmed with additions. The lower orders of people were, in consideration of law, servants, laborers, artificers, and beggars.” This classification is surely not American.

“It was now enacted, that no servant, either man or woman, should depart at the end of his service, out of the hundred, rape, or wapentake, where he dwelt, to serve or dwell elsewhere, unless he brought a letter patent, containing the cause of his going or the time of his return, under the king’s seal. Persons harboring such wanderer, not having a letter, were to be fined by the justices if they harbor him more than one night.”

“And, to prevent disorders, it was ordained, that no servant, laborer, or artificer, should carry a sword, except in time of war, or when travelling with his master; but they might have bows and arrows, and use them on Sundays and holidays. And they were required to leave all playing at tennis or foot ball, or other games called quoits, dice, casting of the stone kails, and other such impertune games. This is the first statute that prohibited any sort of games or diversions.”

“In the time of Henry IV. it was complained, that notwithstanding the statute of Canterbury, ordaining that no person who worked in husbandry till twelve years of age should be permitted to be put to any mystery or handicraft, yet the children of many persons, having no land or rent, were bound apprentices to crafts, in towns and boroughs, for the pride of clothing, and other evil customs that servants do use within the same. To prevent which, none should put his son or daughter apprentice to any craft or labor within a city or borough, except he had land or rent to the value of twenty

shillings per annum at least, but he should put them to other labor, as his estate required, on pain of one year's imprisonment. All laborers and artificers are annually to be sworn at the leet, to observe the statutes relating to their wages, and if they refused, to be put in the stocks three days. To facilitate this it was provided, that every town or seignory, not having stocks, was to be fined a hundred shillings."

Thus we find that towns had subsisted without stocks, as in this our own happy country, till these mischievous laws and persecutions rendered them essential, and made it penal to be without stocks.

These statutes were continued in England, with additions and alterations, from time to time; but history shows they were always abhorred, and consequently difficult of execution.

"In the time of Hen. VI. it appears that masons used to hold confederacies and meetings, to concert schemes for opposing the statutes of laborers. To prevent the effects of them it was enacted, that any one causing such chapters or congregations to be assembled, should be judged guilty of felony."

Still, the more obnoxious those laws became to human feelings, the more difficult it was to execute them; and we find that in the reign of Elizabeth, if not more tender, more wise, than her predecessors, they were all repealed. The repealing act is entitled, "An act containing divers orders for artificers, laborers, servants of husbandry and apprentices." After reciting that a great number of statutes stand in force presently on the subject, it proceeds: "Yet partly for the imperfection that is found in sundry of the said laws, and for the variety and number of them, and chiefly for that the wages and allowances limited and rated in many of the said statutes, are in many places too small, and not answerable to this present time, respecting the advancement of prices of all things belonging to the said servants and laborers, the said laws cannot, without the great grief and burthen of the poor laborer and hired man, be put into good and due execution."

Yet had the execution of these laws been all along enforced "to the great grief and burthen of the poor laboring and hired man;" and the poor hired man was all along

forced to swear to them, or else be put two nights and three days in the stocks, and the rest of his life-time in gaol; and whoever was moved by pity to harbor him, was declared a malefactor for his sake. Was this, or was it not, warring against humanity, against Christian charity, and the religion of an oath. By this statute, too, the justices were to fix the wages of workmen, and whoever gave more, as well as he who took more, than they fixed, was imprisoned; and those bred to arts were to be put in the stocks two days and one night if they refused to work at husbandry; and both men and women were compellable to work one-half of the year from five in the morning till eight in the evening, and the other half of the year from twilight to twilight, that is, as long as they could see.

If we begin to adopt these stupid acts of oppression we shall find it difficult to stop. There are others of the same family, so connected in kind, that they hang together like tape worms—you cannot take one but you must pull all with you.

There is one regulating what persons of every degree should eat, on what particular saints' days they should have sauce to their meat, and of what their sauce should be made; and the reason given is, that "the English used more meat than any other people, which not only hurt their souls, but left less for them to give the king when he had need of it."

There are others as fantastical, called statutes of apparel, prescribing, according to the condition of each man and woman, of what form and stuff their coats or petticoats should be. One enacts, that no hat shall be above twenty pence, nor cap above two pence. Another, that wearing silk on hat or bonnet, gilt scabbards, hose, shoes, and spur leathers, shall be three months' imprisonment and forfeiture, etc.

Another, that all persons above seven years old shall wear caps, or forfeit three shillings and four pence to the king, except maids, ladies and gentlewomen of twenty marks lands, and lords, knights, etc.

Before we borrow from such a code, let us examine, from

good evidence, what was the spirit of old times, and what progress human reason had made when the principles we are about to adopt first took their rise.

I have now my finger on a statute which is precious in that view. It is unfortunately in that fearful jargon called law French, which modern men cannot pronounce for fear of dislocating their jaws. I would as soon crack so many butternuts as pronounce so many words of it. I shall, therefore, humbly beg leave of the court to read some passages in English.

It is thus entitled:

“What kind of apparel men and women of every degree are allowed to wear, and what prohibited.”

“It is ordained and established that no person of the degree of a valet, or under that degree, at the feast of Saint Peter, called the chains, which shall be in the year of our Lord one thousand cccclxi, shall use nor wear in array for his body, any bolsters, nor stuffs of cotton, wool, or cadas; nor other stuffing in his parer point, upon pain of forfeiting to the king for every offense, vi, s. viii, d. No knight under the estate of a lord, no esquire, gentleman, nor other person, to use nor wear at the feast of All Saints, which shall be in the year of our Lord one thousand cccclxv any gown, jacket, or cloth, of such a length.” (See p. 22.) The court will excuse me from saying for the present of what length. Nor wear at the feast of Saint Peter any shoes or boots having pikes passing the length of two inches, upon pain of forfeiture to the king for every default forty pence. If any cordwainer make any pikes of boots or shoes after the feast of St. Peter, contrary to the ordinance, he shall likewise forfeit to the king for every default forty pence.”

Here is another, entitled, “A repeal of all former statutes touching the excess of apparel.”¹² It is fortunately in English. It recites:

“That for the non due execution of the former laws, the kingdom had fallen into great miserie,” and enacts, “that no person, of whatever degree, estate or condition that he be, shall wear any clothes of gold or silk, or purple color, but only the king, the queen, the king’s mother, the king’s children, his brother and sisters, upon pain of forfeiture for every default, xx, li. And that none under the degree of a duke shall wear any cloth of gold of tissue, under xx marks. And none under the degree of a lord shall wear plain

¹² 22 Edw. IV., c. 1.

cloth of gold, upon pain to forfeit for every default x marks. And none under the degree of a knight shall wear any velvet in their doublets nor gowns, nor under the same degree wear any damask nor satin in their gowns, but only esquires for the king's body, upon pain to forfeit for every default xl. s. And that no yeoman of the crown, nor none other shall, under the degree of esquire or gentleman, wear in their doublets damask or satin, nor gowns of chamlet, upon pain to forfeit for every default forty shillings. And no servant of husbandry, nor common laborer, shall wear in their clothing any cloth whereof the broad yard shall pass the price of two shillings; nor suffer their wives to wear any clothing of higher value than is before limited to their husbands. Nor shall they suffer their wives to wear any veil or kercheff whose price exceedeth twenty pence."

What would our merchants in Broadway and Maiden Lane say to such fashions. Our wenches would not buy such veils or kerchiefs to wear on washing days. "Nor shall they wear any hosen whereof the pair shall pass eighteen pence, upon pain of three shillings and four pence." If our ladies were not to exceed that price for their hose, they must go bare-legged.

The ordinance then gives the pains and forfeitures to the king, to be employed in the expense of his honorable house. So the more there was of law-breaking the better for the king's house. "But pains and forfeitures in and for the premises within the county palatine of Chester, shall be to my lord the prince; and within Examshire, to the archbishop of York, and his successors; and within the bishoprick of Durham, to the bishop of Durham, and his successors." Thus every little vanity of the women was forty pence clear gain to the bishop and his successors, of the see of Durham, "after the feast of the epiphany next coming, but not before." And if the words that follow were of any other man than King Edward the Fourth, I might scruple to utter them; but what was fit for that gallant prince to decree, I should not be too fastidious to utter, nor this honorable court disdain to give ear to.

"And it is ordained and enacted, by the authority aforesaid"—that is, of King Edward the Fourth—"that no manner of person under the estate of a lord shall wear from the

said feast any gown or mantel, unless it be of such length that (he being upright) it shall cover his privy members and his buttocks, upon pain to forfeit to our sovereign lord the king for every default twenty shillings."

The rigor of this ordinance is, however, tempered by some exceptions, and has, among others, this proviso: "Provided that the same act be not prejudicial to master John Gurthorpe, the dean of the king's chapel." Thus master Gurthorpe, though under the estate of a lord, was not so far prejudiced by the act but that he might stand upright, and show himself gratis to the king, which no other man else could do under twenty shillings a time; and why? Because master John was the king's dean! and the king would charge him nothing.

If the gentlemen for the prosecution ask to what purpose I read such statutes, I will tell them. It is to moderate their enthusiasm for old English laws and ordinances, and to render them better contented with the institutions and usages they have.

Still if there were no worse laws than these masquerading regulations, distinguishing the community, like the Hindoo casts, we might laugh at their absurdity; but the laws against artisans in England are of a more cruel nature.

The hardship, for instance, of making justices, who never labored, the judges of the poor man's labor, its intensity and its remuneration, is not equitable. They are not, in that respect, treated as free agents; they are not judged by their peers. The qualifications of those English justices are no qualifications for arbitration of such kind. They may be "most sufficient knights and esquires, with freehold, copyhold, or customary estate;" they may be "of the peace and the quorum." They may be loyal men to church and state; but such will be too apt to scorn a leather apron. It is not with their back to the fire, and their belly to the table, that they can perceive the poor man's wants. When they have eat their capon, and swallowed their sack, with their reins well warmed, and then turn round to take their nap, with

their backs to the table and their belly to the fire, they are not the better qualified to judge the poor man's case. Sir Guttle may calculate, that if the lean rascals were to feed well, they might wax as fat as gentlemen. And justice Drowsy might conclude, that, as there was but a time for all things, if the handicrafts got more time to sleep, there would not be enough left for gentle folks. If justice Testy has the gout, and his shoe should pinch, it would be reason for putting all the ragamuffins in the stocks. This may be exaggeration. Perhaps it is, but if there be any truth in it, let it go for what it is worth.

There exists at this day a law in England that artificers in foreign countries, not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and be incapable of any legacy or gift. By it the industrious man, whose only crime is the possession of some useful art, and having transported himself to a country where, instead of groaning under taxes and tithes, he might enjoy the fruits of his labor, and the blessings of equal laws, is subject to be remanded, like a prison-breaker, by an ambassador, sent amongst us, possibly for the purpose of debauching our people, insulting our government and planning our destruction.

Other statutes inflict fine, imprisonment, pillory and ear-slitting upon such as encourage any artisan to seek a better lot; and this they call "seducing artisans."

I recollect, in my native city, a strong instance of this kind. At Londonderry there was a passage across a river, as inconvenient as either of our ferries. The desideratum was a bridge. The honor of the achievement was reserved for Mr. Lemuel Cox of Boston. He brought with him a few chosen workmen, and employed a number of the poor laborers of the country. They learned from their American fellow laborers how much better industry was rewarded in the western world. They addressed themselves to their honorable employer. He was not guilty of seducing them, nor

they of being artisans. He was put in prison. His innocence was manifest, and he was released; but such was the envious return for the greatest benefit that city ever knew.

Shall we, then, second the intention of the oppressor? Shall we, by such prosecutions, drive from our hospitable shores those who increase our stock of industry, population and revenue? Shall we too hunt the wanderers like frightened birds, that find no twig unlimed, no bough to light upon? Shall we, without law or precedent, and in the teeth of a non-usage, as old as the annals of our country, rake up the embers of the English common law to find a pretext for doing what never was done before, and never should be done?

If we do this we must do more. We must also make statutes of laborers. For these persecutions will thin the artisans here as the great plague did formerly in Britain. Like birds of passage, no longer warmed by a genial sun, the instinct of their nature will warn them to depart. Unless restrained by bolts or penalties, they will flock together, even on the house tops, and take their flight no man knows where; not like the summer swallows for a season, and to return again; but like the vital breath, which, when it quits its earthly residence, leaves it for ever to decay and moulder, and returns no more.

The avarice of the Patricians drove the people of Rome to the mons sacer. Who is the people-hating Appius Claudius that would do so here? And if it be done, which of these sleek and pampered masters, will it be, Mr. Corwin, or Mr. Minard, that will take upon him the office of Agrippa, to cajole them with a parable, how he is all belly, and they all members; how his vocation is to eat and repose, theirs to work and starve.

Let not these allusions be thought foreign to the point. It is by taking larger views of things that we master the little fidgeting spirit of circumstance. Such considerations are antidotes to those occasional spasmodic affections in the law, which it is important to cure in their incipency, lest they turn, as in Great Britain, to a chronic malady.

This prosecution goes professedly upon principles of common law; and I have shown an ancient definition of the crime in affirmance of the common law, to which it is repugnant. I have shown the same statute re-enacted in this State coeval with its constitution. I have shown negative usage in England down to the passing of the statutes of laborers, and here as ancient as the history of America, and as uninterrupted as the blessings that have showered upon this land. I shall now show, that though the common law of England should warrant such a prosecution, it does not follow that it should prevail here. And to this end, it will be necessary to take a view of the principles which govern the adoption of the laws of a mother country into new settlements.

The substance of all the authorities in the English books, upon the head of transplanting the English law into new countries, is concisely stated in 2 Peere Williams' Reports. There the master of the rolls is reported to have said, that the lords of the council had determined, upon appeal to the king and council from the plantations:

"1st. That if there be a new inhabited country found by English subjects, as the law is the birthright of every individual, so they carry their laws with them, and, therefore, such new found country is governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them; for which reason it has been determined, that the statutes of frauds and perjuries, requiring three witnesses to a devise of lands, does not bind Barbadoes. 2d. Where the King of England conquers a country it is a different consideration; for the conqueror, by saving the lives of the people conquered, gains a right and property in such people in consequence of which he may impose upon them what he pleases."

I shall not investigate the latter clause, nor inquire how far the Dutch inhabitants became the property of King Charles by reason of his "saving their lives." How far such doctrines, in a limited monarchy, are constitutional; how far they are humane, in any circumstance, I leave to others. But, as the English settlers were encouraged by the promises

of a domestic legislature and a constitution, they were not the property of the king, and they had still their birthright. Now a birthright means some indefeasible advantage, or it means nothing. Where it is said, that new settlers are entitled to the English laws as their birthright, it cannot be intended that they should be encumbered with such laws of the mother state as would be noxious and oppressive, and utterly repugnant to their new condition.

The authority of Sir William Blackstone upon this head is strongly pronounced. He says:

"These notions of the law of England being *ipso facto* in force in a new country, as the birthright of the settlers, must be understood with many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony, such, for instance, as the general rules of inheritance and protection from personal injuries; the artificial refinements and distinctions incident to the property of a great and commercial people; the laws of police and revenue, such, for instance, as are enforced by penalties; the mode of maintenance for the established clergy; the jurisdiction of the spiritual court; and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted, and what rejected; at what times, and under what restrictions must be decided in case of dispute, in the first instance, by their own provincial judicature, subject to the revision and control of the king and council."

I shall adventure no further on this subject. It is enough for me that our judges are free to determine what parts of the common law shall be adopted, and what rejected. Formerly, the provincial legislatures of the colonies could do it, subject to the revision and control of the king of England and his council. Our independent judges will now decide without any such control. I shall, however, call to my aid a short passage from a very useful domestic historian, in treating "of our laws and courts."

"The state of our laws opens a door to much controversy. The uncertainty with respect to them renders property precarious and greatly exposes us to the arbitrary decisions of bad judges."¹³

¹³ Smith's Hist. N. Y., c. 6, p. 262.

Let it be remembered this was written when the judges were appointed by a foreign influence, and our benches not filled as they are now, by judges who possess the people's confidence.

"The common law of England is generally received together with such statutes as were enacted before we had a legislature of our own. But our courts exercise a sovereign authority in determining what part of the common and statute law ought to be extended; for it must be admitted that the difference of circumstances necessarily requires us in some cases to reject the determination of both."

Judge Tucker, a writer worthy of his country, states, that all parts of the common law and statutes of England, which from their inapplicability had never been brought into practice, during the existence of the colonial governments, must, from the dissolution of those governments, be regarded not only as obsolete, but as incapable of revival, except by constitutional or legislative authority, having no longer even a potential existence, founded upon that theory of British laws, extending to the remotest extremity of the empire: for the connection once broken, he considers, that theory at an end; and, therefore, such as never had obtained authority from usage and custom, he holds destitute of every foundation upon which any supposed obligation could be built. This he considers the natural consequence of the revolution, and the correspondent changes in the government; unless, he emphatically adds, "we suppose that the laws of England, like those of the Almighty Ruler of the universe, carry with them an intrinsic obligation upon all mankind; a supposition too gross and absurd to require refutation."¹⁴

Several of the state constitutions, with the same intention as ours, have used a more definite expression, and instead of saying that such parts of the English laws as were *therefore* in force, should continue to be so, till repealed, etc., they have used the term "practiced on," extinguishing, without more form, all such obsolete or incongruous parts as had not been

¹⁴ 1 Tuck. Black. App., p. 406.

found applicable to the necessities of their condition; such as during two or three centuries, or since their first origin as a colony, had never been called into activity.

In vain, otherwise, would our constitution have repealed the statutes. In vain have consigned to oblivion so many remnants of antiquated folly, if ever and again some unsubstantial spectre of the common law were to rise from the grave in all its grotesque and uncouth deformity, to trouble our councils and perplex our judgments. Then should we have, for endless ages, the strange phantoms of Picts and Scots, of Danes and Saxons, of Jutes and Angles, of Monks and Druids, hovering over us like "ravens o'er the haunted house," or ghosts

"That inglorious remain
Unburied on the plain."

In vain would this country advance in commerce, arts and industry; in vain science and philosophy make their abode among us; in vain propitious heaven designate with a favoring hand our station on the globe, and distinguish us by freedom and prosperity, if we mar our own destiny by such servile adherence.

A century ago, when the independence of this nation had never been imagined, when it was ruled as a colony by a despotic governor, two presbyterian clergymen were arrested by Lord Cornbury for preaching in an illegal conventicle.¹⁵ They were brought to trial, and the prosecution was founded upon the idea that the acts of conformity and uniformity were in force, and that the queen's church supremacy was to govern in the colony as in the mother country. The jury refused to find a special verdict at the desire of the prosecutor; but acquitted the defendants. The matter was there dropped, and no such prosecution has ever since been attempted. But that which might have been before the revolution, *vexata questio*, is now surely past all

¹⁵ *Vide* the case of Mr. Hampton and Mr. Kemmie, Smith's Hist. N. Y., p. 126.

doubt. Why was that prosecution then defeated? Because what was law in England was not then taken for law in the colony. Yet those statutes were law in England before the settling of this country; and the queen's supremacy was held part of the common law. But it required two things: first, that it was law in England; and, secondly, that it was useful or expedient to be adopted in the new country.

The more I reflect upon the advantages this nation has gained by independence, the more I regret that one thing should still be wanting to crown the noble arch—a national code.

I lament that the authors of the revolution, wearied with toil and human waywardness, should, on the very threshold of perfect redemption, have failed, like the fabled poet of antiquity,^{15a} by looking back, and suffered the object of their long and ardent cares to relapse again into the empire of Pluto, and themselves to sing at length breathless and spent under the burthen of the common law.

Much, it is true, was done. A nation was rescued from colonial dependence; her citizens from prerogative, monopoly, and privilege; religion purged from intolerance; and a constitution was founded on the sacred rights of man. They might well exclaim, *sat patria*, who had done so much, and having done so much, perhaps, have thought it beneath their high achievements to stay and strip the dead. They might think it wiser to trust to peaceful posterity and tranquil times to perfect their great work. Why, then, do not those who live beneath the shade which they have planted, generously answer to their intentions, and fulfill their great designs?

I have said that there was no American precedent for this indictment, unless it were imported from Great Britain in this present year, and I hold in my hand a minute report of a similar case in Philadelphia, where the law was fully and ably discussed at the bar, and where it appeared, *ex con-*

^{15 a} Orpheus.

cessis, that no such precedent existed in America. The only opinion as yet to sanction it is that of a single judge, Mr. Levy, the recorder of Philadelphia. Before that becomes precedent and law, I shall, without personal disrespect, canvass, with due freedom, the doctrines he lays down to the jury as law. He first warns the jury against the arguments of counsel, as being but appeals to their passions, and then reminds them that such combinations will enhance the price of their own boots, touching, I think, himself upon a very sordid passion. Boots, he says, are articles of first necessity. I cannot there agree with him. When I think how many patriarchs have reached the blessed abode of their fathers, and never worn boots, how many serjeants have trod the thorny mazes of the common law, and worn no boots, and how many poor poets have bestrode the fiery courser of the muses, and had no boots, I cannot think them things of such necessity. But equal justice is of first necessity, and when that is given for the sake of boots, boots are too dear.

His honor said it was improper to inquire whether or not the application of the common law to our concerns would operate as an attack upon the rights of man. But surely if it did so, and that could be shown, it would be repugnant to our constitution; and, if it would, the constitution must prevail above the common law of a foreign country; then whether it be, or be not, an attack upon the rights of man, is the very fittest thing to be inquired into. The argument of the learned judge, I think, is, upon that ground, *a petitio principii*.

Again; he is reported to have said, that it was indifferent whether the prosecution arose from good or bad motives; whether the traversers' intentions were to resist oppression, or to demand extravagant compensation. If he had said this upon the ground that in neither case a public prosecution would lie, it might have been true; but when his charge went to convict, it appears too like confounding all right and wrong, to make no distinction between a prosecution founded in honesty, and one founded in corruption; or between the

acts of defendants, whether founded in extortion or self defense.

He admits, however, that a single journeyman may refuse to work, but many journeymen, jointly, must not. How a solitary poor workman shall resist a wealthy and powerful combination of masters I know not. There seems to be mockery in the idea. If the sense of individual weakness is the cement of all human society, what have journeymen done that they should be put out of the pale of human society? Must they be scattered like the sheaf of rods, to be more easily broken?

His honor states next, that a great number of the prosecutions in his court are brought forward from improper motives. The compliment is not flattering to his suitors; but that is immaterial to the question here.

The great principle upon which I rely he lays down as fully as we could wish; but then he draws from it a quite opposite conclusion. He says, "when the demand is considerable, and the work well done, the price will be high, and vice versa. So that to make artificial regulations is not to regard the excellence of the work or quality of the material." I ask, then, why call in the law to make artificial regulations? Why not let the thing naturally regulate itself? It seems as if folly had this privilege, to be seen only at a distance, and be invisible when it stares us in the face. We can see well enough the ridicule of the old priggish ordinances we have read from the statutes at large, which fashioned men's gowns, and women's fardingales, by act of parliament. We have laughed at the short mantle of Dean Gurthorpe. Others after us will laugh at our solemn arguments of this day. We might as well prevent parents from conspiring to marry their children, indict landlords for refusing to let their house at the usual rents, or merchants from following the rates of the markets. We never should have had such notions, but that we are in the habit of borrowing the fashions of our thoughts like those of our dress, from a foreign nation.

Pains and penalties ought not to be for nothing. Every restrictive law is more or less an evil. To inflict punishment without sufficient cause is to be a wrongdoer; and the onus of showing the necessity lies upon the actor.

The next argument of the learned judge is drawn *ab inconvenienti*. "When a master receives a large order from abroad he cannot say how far it will be his advantage to accept it, because, if the workmen hear of it, they may make a sudden jump in advance of their labor." Well! if the master receives an advantageous order, much good may it do him. But if he makes a sudden jump into a coach and country seat, why shall not the poor journeymen jump after him into a clean shirt and whole breeches?

The recorder did well to state the sufferings these turns out occasioned; but he would have done still better not to have decreed the triumph to the aggressor. No body of men will inflict upon themselves a greater evil to cure a small one, the very violence of the remedy gives the measure of the grief.

"Whether the confederacy is to benefit themselves by raising their wages, or to injure those who will not join them, the rule of law," says his honor, "equally condemns them." I think such principles rob the law of dignity and efficacy. They are unnatural, indiscriminating, and harsh, and tend to make the law feared, but not respected; for

Nemo quod timet amat.

As to the danger of the community going barefooted, I do not think it alarming. It will be a specious pretext for wearing out old shoes. The cobblers will rejoice; and some sly merchant will import a cargo from France or England. Muzzle but these prosecutions, and then, before we have gone long slipshod, the masters and the men will have come to an agreement, founded, like all bargains, on reciprocal need; the one giving as little as he can give, and the other taking as much as he can get. Then will all go on quite well; there will be neither life lost nor bone broken; and no germs

planted of a race of future artisans with gray hair and red eyes.

The eulogium of the learned judge upon the common law is, to my judgment, something exaggerated, when he likens it to the divine system of providence.

"It is in the volume of the common law," he says, "that we are to seek for the far greater number, as well as the most important, of the cases that come before our tribunals. That valuable code has ascertained and distinguished with critical precision, and with a consistency that no fluctuating political body could or can attain, not only the civil rights of property, but the nature of all crimes from treason to trespass."

When such arguments are used to induce a conviction of a great portion of the American citizens, it is the duty of their advocate to speak out honestly. At the time when the common law had its origin, no part of which time could be since the beginning of the reign of Richard I. called in law time of memory, and that is about six or seven hundred years ago, no property existed under any of the modifications which now regulate it. There was no commerce, few arts, and little circulation; so that if we were to look into "that volume" alone, we should not find a rule to square with any transaction of our lives. If, therefore, it be like divine providence, divine providence has long abandoned us. And were we now to adopt the usages of those times, we should be like masqueraders upon the present stage of society. Touching shoemakers certainly we should find no laws, for lord and lady, knight and esquire, all went barefooted; and, possibly, whoever lived in the days of the Druids, might have counted the ten toes of her majesty the queen. Therefore, if we can find no usages touching the matter nearer at hand, it is useless to look for them so far.

In the old volumes of the common law we find knight-service, value and forfeiture of marriage, and ravishments of wards; aids to marry lords' daughters, and make lords' sons knights. We find primer seisins, escuage, and monstrans of right: we find feuds and subinfeudations, linking

the whole community together in one graduated chain of servile dependence: we find all the strange doctrine of tenures, down to the abject state of villenage, and even that abject condition treated as a franchise. We find estates held by the blowing of a horn. In short, we find a jumble of rude undigested usages and maxims of successive hordes of semi-savages, who, from time to time, invaded and prostrated each other. The first of whom were pagans, and knew nothing of divine law; and the last of whom came upon the English soil towards the decay of the Roman empire, when long tyranny, and cruel ravages, had destroyed every vestige of ancient science, and when the pandects, which shed the truest light that ever shone upon the English code, lay still, buried in the earth.

It is of this divine law that Lord Coke gravely and very quaintly says, "the common law was that which was in England before any statute was enacted. It is grounded upon the general customs of the realm; includes in it the law of God, and the principles and maxims of the law. It is founded upon reason, is the perfection of reason, acquired by long study and experience, and refined by learned men in all ages." It must be confessed my Lord Coke did not tie himself down by too precise a definition. Such phrases are sooner made than comprehended, in which the teacher has the advantage of the learner. Blackstone says:

"With regard to the aborigines of our island, the Britons, we have so little handed down to us with certainty, that our inquiries must be fruitless and defective. However, from Caesar's account of the ancient Druids in Gaul, in whom centered all the wisdom of the western parts, and who were sent over to Britain (that is, to the island of Mona or Anglesea) to be instructed, we may collect a few points which bear a great affinity to some of the modern doctrines of our English law; particularly the very notion itself of an oral, unwritten law, delivered down from age to age by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing, possibly for want of letters. Since it is remarkable, that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not, in any of them, the least trace of any character or letter to be found."

Thus was this divine system delivered down by the Druids, who, after possessing all the learning of the western parts, were sent to perfect their studies in Mona, and there became so learned that they could neither read nor write!

After touching upon other of their wise practices, such as burning their women for petty treason, our author continues:

"The great variety of nations that successively broke in upon and destroyed both the British inhabitants and constitution, the Romans, the Piets and after them the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom, as they were very soon blended and incorporated together; and, therefore, we may suppose mutually communicated to each other their respective usages, so that it is impossible to trace, with any degree of accuracy, when the several mutations of the common law were made, or what was the original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce that this custom was derived from the Britons; that was left behind by the Romans; this was a necessary precaution against the Piets; that was introduced by the Sxaons, discontinued by the Danes, but afterwards restored by the Normans.

"A further reason may be also given for the variety, and of course, the uncertain original of our ancient established customs, even after the Saxon government was firmly established in this island, viz.: the subdivision of the kingdom into a heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite variety of laws, though all the colonies of Jutes, Angles, Saxons and the like, originally sprang from the same mother country, the great northern hive which poured forth its warlike progeny, and swarmed over Europe in the sixth and seventh centuries."

Now here is from the pen of the most passionate and eloquent eulogist, who had a professor's chair and a salary for praising the common law, an account of the true ancestry of this divine system. All I can say of it is this, that the same panegyric will apply *totidem verbis* to the institutions of our red brethren, the Iroquois. The league of the five nations is similar to that of the heptarchy. Blackstone here tells us that the Saxon heptarchy was composed of Jutes,

Saxons, Anglo-Saxons, and the like; all sprung from the great northern hive, that poured forth its warlike progeny. The historian of the five nations¹⁶ tells us, that they consisted of so many tribes, or nations joined together by a league or confederacy, like the united provinces, and without any superiority the one over the other. This union, he adds, has continued so long that the Christians know nothing of the original of it: the people in it are known by the English under the names of Mohawks, Oneidas, Onondagoes, Cayugas, and Senecas. Here, then, is an ancestry fairly worth that of the great northern hive. The one had their Michell-Synoth, or Witena-Gemot; the other their sachems and counsels, of whom the historian thus speaks:

"Their great men, both sachems and captains, are generally poorer than the people, for they affect to give away and distribute all the presents or plunder they get in their treaties or war, so as to leave nothing to themselves. There is not a man in the ministry of the five nations who has gained his office otherwise than by merit; there is not the least salary or any sort of profit annexed to any office to tempt the covetous or sordid. Here we see the natural origin of all power and authority amongst a free people.¹⁷

"The five nations think themselves, by nature, superior to the rest of mankind, and call themselves *Ongue honwee*."

Ongue honwee then say I; and away with your old barons, kings, monks, and druids, your Michell-Synoth, and your Witena-Gemot. If we look to antiquity the red men have it. If we regard duration, they have it still more, for the Picts and the Britons have long ceased to dye themselves sky-blue. The Indian paints himself for war even to this day. The one scalps the enemies of his tribe; the others burned their own women. The Saxons conveyed their lands by sod and twig; the Tuskaroras by the more elegant symbols of beaver and a belt.

When Christianity found its way among the descendants of the northern hive, some little learning was introduced, but little it must have been, when the bare writing of a

¹⁶ The Hon. Cadwallader Colden, p. 1.

¹⁷ *Ibid.*, p. 2.

man's name would save him from the gallows. That was the venerable privilege of their clergymen. He who could read in a book needed neither clerical gown nor shorn crown, for it was presumed one so qualified could be nothing but a priest.

Under this divine system, then, the commandment of God, "thou shalt not kill," stood thus amended: thou shalt do no murder, unless thou beest a clergyman.

How does this adopt itself to our sentiments of religion? How would our clergy, whose only immunity is the purity of their lives, spurn at such a privilege?

A statute, comparatively old, says, "no person which shall be found guilty of petty treason, wilful murder, robbing of churches, wilful burning, etc., shall have his clergy, unless he be of the orders of subdeacon or above." How do our purer notions of religion tally with this monstrous distinction, that the higher the spiritual charge the greater the impunity for crime. A Jew or a Turk had not clergy, but a Greek or an alien had. A bastard or a blind man might have it if he could speak Latin congruously. A nun being within the *immunitas ecclesiae* had it. But a wife had it not, and, therefore, if she committed manslaughter with her husband, he was privileged, but not she! Nuns alone of all the fair sex were privileged to kill men, or, in other words, were within the church's immunity; no other ladies could, by any intendment of law, be taken for clergymen.

Cicero wondered how two soothsayers could look each other in the face. I wonder how the two learned expounders of the common law opposed to us can do so without laughing.

When Blackstone employs his elegant pen to whiten sepulchres, and varnish such incongruities, it is like the knight of La Mancha extolling the beauty and graces of his broad backed mistress winnowing her wheat or riding upon her ass.

There was once an hypochondriac who fancied he was pregnant with something that would astonish all posterity. In

vain his best friends remonstrated with him; their expostulations only irritated and aggravated his malady; but his skilful physician judged it wiser to comply with his humor; and having chanced to find a hedgehog, presented it to the patient as the fruit of his travail. He pressed the urchin with transport to his bosom, and felt that it was prickly. He kissed it, and found its legs; he looked at it, and acknowledged that it had some rough and uncouth features; but he loved it because it was his own, and his fond prayer was, sweet babe, may you live forever—*esta perpetua!*

The enemies of the common law, says the recorder of Philadelphia, when they attack the common law, single out some detached branch of it, and declare it absurd and unintelligible, without understanding it. If this be so, I think it is not the worst generalship; all enemies attack each other in the weakest part of their lines. I do not profess to attack the common law, though I have no superstitious reverence for it, and think there are other systems as good. But since it is the common law which is set on to trample down my clients, I have resolved to take the bull by the horns. It is said that no man who does not understand the whole of it is fit to judge of any part of it. If that be so, I think it will have its privilege of clergy, for there lives not a judge upon earth who is entitled to cognizance of it. Lord Coke, who inked more paper with it, and bestowed more time and study upon it, than perhaps any other, exclaims, that ever with increase of knowledge cometh increase of doubt. He also says, that in its fictions consist all its equity. He that is to judge of it then must not increase his learning, for that would increase his doubts, and render him as it were, a Doctor Dubitanium. And he must addict himself to fiction to comprehend its equity. When he has done this he will have the qualifications that belong to knave and fool.

Let us examine it in its most essential parts, and what is it? What ever could have been the wisdom of that law which decided upon the life and death of man by blasphemous appeals to miracles; by fire and water ordeal; by the choak

bread and the holy cross; and which decided upon property by venal champions; by thumps of sand bags, and the cry of craven? How does this accord with our principles and institutions, which do not admit of fighting cocks for money, much less men?

Why did our constitution repeal the English statutes, and declare that nothing of the common law, repugnant to that constitution, should remain, if antiquated barbarities were still to be revived and visited upon us; and if we are not to be allowed even to inquire whether they are attacks upon our rights or not? We should then be worse off than the English people are; for many of the old common law doctrines are abrogated by English statutes, but in which the colonies were never named, and with which the colonial legislators never meddled, not supposing them to have had force of law on this side the Atlantic. Our case would be singular on the earth. Our judges might then unlearn all they had studied of national or congenial institutions, to make themselves proficient in Mercian lage and Dane lage. They might study more majorum in hollow trees and caverns, till they forgot to read or write, and became Druids at common law.

When is it that we shall cease to invoke the spirits of departed fools? When is it, that in search of a rule for our conduct, we shall no longer be bandied from Coke to Croke, from Plowden to the Year Books, from thence to the dome books, from ignotum to ignotius, in the inverse ratio of philosophy and reason; still at the end of every weary excursion, arriving at some barren source of grammatical pedantry and quibble.

How long shall this superstitious idolatry endure? When shall we be ashamed to gild and varnish this arbitrary gathering of riddles, paradoxes, and conundrums, with the titles of wisdom and divinity? When shall we strike from the feet of our young and panting eagle these sordid couplets that chain him to the earth, and let him soar, like the true bird of Jove, to the lofty and etherial regions, where destiny and nature beckon him?

Those who framed the constitution under which we live did not abolish all the common law, and they did right, because in that, as in other systems, there is always something to approve, and use had sanctioned it. They did not pursue it through all its complex details, for that would have been endless and impossible: but they abolished all the English statutes, and by a general clause, abrogated all of the common law that should prove in contrariety with the constitution they established. In Philadelphia, the recorder says, you shall not even inquire whether the act in judgment is or is not an attack upon the rights of man. But the constitution of this state is founded on the equal rights of men, and whatever is an attack upon those rights is contrary to the constitution. Whether it is or is not an attack upon the rights of man, is, therefore, more fitting to be inquired into, than whether or not it is conformable to the usages of Picts, Romans, Britons, Danes, Jutes, Angles, Saxons, Normans, or other barbarians, who lived in the night of human intelligence. Away with all such notions.

Shall all others, except only the industrious mechanic, be allowed to meet and plot; merchants to determine their prices current, or settle the markets, politicians to electioneer, sportsmen for horseracing and games, ladies and gentlemen for balls, parties and bouquets; and yet these poor men be indicted for combining against starvation? I ask again, is this repugnant to the rights of man? If it be, is it not repugnant to our constitution? If it be repugnant to our constitution, is it law? And if it is not law, shall we be put to answer to it?

If it be said, they have wages enough, or too much already, I do not think any man a good witness to that point but one who has himself labored. If either of the gentlemen opposed to us will take his station in the garret or cellar of one of these industrious men, get a leather apron and a strap, a last, a lap-stone and a hammer, and peg and stitch from five in the morning till eight in the evening, and feed and educate his family with what he so earns, then if he

will come into court, and say upon his corporal oath that he was, during that probation, too much pampered or indulged, I will consider whether these men may not be extortioners.

The principal authority relied on in Philadelphia, was a passage from Hawkins, and I am bound to say, that that authority was grossly mistaken. It was adduced to show that these men were indictable at common law. The passage is thus:

"It seems certain that a man may not only be condemned to the pillory, but also be branded for a false and malicious accusation; but since it does not appear to have been solemnly resolved that such offender is indictable upon the statute; it seems to be more safe and advisable to ground an indictment of this kind upon the common law, since there can be no doubt that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; as where divers persons confederate together, by indirect means, to impoverish a third person; or falsely and maliciously to charge a third person with being the father of a bastard child, or to main one another, in any matter, whether it be true or false."

Now the whole of this passage, when understood, shows the contrary of what it was cited for. The author ratifies the common law definition of conspiracy and maintenance, and justly observes, that all indictments for false and malicious conspiracies (for of such only he is then treating), are more safely laid at common law, and that for such false and malicious accusations men may be branded. "False and malicious accusations of this nature are indictable," he adds, "rather at common law than under the statute; and it does not appear to have been ever solemnly decided, that such false and malicious accusations are indictable under the statute."

Was it not a perversion of this author's meaning to suppose that it applied to a confederacy of mechanics for the regulation of their own concerns? What has their case to do with the doctrine of false and malicious accusations? And as to what he says of divers persons confederating by indirect means to impoverish a third person, or falsely charge a third person with being father of a bastard child, or to maintain one another in any matter, whether true or false; has not this

a manifest reference to the crimes of false conspiracy and maintenance, as already defined, and which being *crimina falsi*, subjected the party to be branded for the falsehood? What has all that to do with the wages of tradesmen?

The notion that confederating to do anything indirectly tending to impoverish a third person, is indictable at common law, is so puerile a mistake, that I feel distressed to be under the necessity of exposing it. Surely, if men were indicted for conspiring to build a steamboat, which would indirectly impoverish some third person, for instance, the master of a passage vessel, the absurdity would be very glaring; or if it was to set up any machinery that would be the means of underselling others.

Hawkins' words must, therefore, be taken *secundum subjectam materiam*, and according to the context. They will then be consonant to old authorities, and the law will be rescued from so absurd a position, as that all men who joined in anything of which the effect might be the incidental diminution of the gains of a third person, should be therefore guilty of the crime of conspiracy, and be liable to branding.

A slight and a very slight acquaintance with law phraseology, or with the popular idiom of one or two centuries past, will suffice to clear away any difficulty which the term indirect may occasion, if taken in its present vulgar acceptation.

Rectum, in Latin, is synonymous with jus, and means law or right; and was anciently used even for the accusation or trial. A man who had reversed his outlawry, or who stood at the bar, and was unaccused, was said to be *rectus in curia*, or *rectum esse*. *Directum*, which has the same root, means the same thing, and has been corrupted by the French into the word droict, or droit, and in the English, by merely throwing away the Latin termination, makes direct. The privative particle in, inverts the sense, and it becomes indirect, which, in the old law phrase, meant nothing but unlawful; as we find the word droit in all our law French books means law, and is the generic term for law in France at this day.

The word droict, which is equivalent to the English direct,

is thus defined in our old law language: "Droict est ou l'on ad chose qui fuit tolle d'auter per tort, le challenge ou le claim de lui qui doit avoir ceo, est terme droit." And the words direct and indirect, are to be found generally used in that sense by authors of no very great antiquity. Johnson defines the term indirect to mean, wrong, improper, not fair nor honest; and indirection he explains to be dishonest practice, but observes that it is not now in use. Shakespear makes Brutus say to Cassius,

"By heaven, I had rather coin my heart,
And drop my blood for drachmas, than to wring
From the hard hands of peasants their vile trash
By any indirection."

Wringing from their hard hands by indirection, means certainly by wrong, and not by circuitry, or by devious consequence, as the modern acceptation would import.

Thus has the sense of this author been perverted; and as nothing multiplies like error, so has this mistake found its way into many book manufactories, but can always be traced back to this single source. And, although it may have had some influence upon the decision of a few very modern cases, yet there is no adjudged case where any act has been held indictable as a conspiracy at common law, whereof the essence, or *corpus delicti*, has not been falsehood, oppression, or unlawful maintenance, in some sort or other; though, perhaps, not always as exactly as the law requires, falling under the definition by the statute Edward I. and by our own statute. There are many execrable cases to be found in English books upon this very subject of conspiracy, as well in the star chamber as out of it. There, if the gentlemen look for precedents, they may find them, where the same wretch¹⁸ has been alternately triumphant accuser and degraded culprit, eulogized and reprobated by the same judge,¹⁹ execrated and honored, whipped and caressed, pilloried and pensioned. Yet with all

¹⁸ Titus Oates.

¹⁹ Scroggs.

the strange and odious things to be found in English cases of conspiracy, there is no precedent of such an indictment as this, unless it be under some statute made expressly on the subject.

If Hawkins had thought workmen indictable for combining to regulate their wages, he would, with his usual precision, when treating so minutely on the subject, have said so, and have given his authority for saying so. His silence on the subject is conclusive that he never even had such an idea, and that there was no such authority.

Another paragraph was cited, from what is called Leach's Hawkins, which paragraph Hawkins never wrote, nor could have written, viz: "that all confederacies are unlawful, though the object of them be lawful." The case from which this strange sentence is borrowed is that of the journeymen tailors of Sambridge, in the seventh year of George I. The death of queen Anne, and the accession of George, happened in 1714. The case must have been decided about 1721. Sergeant Hawkins' entire work, in two folio volumes, was published in 1716.²⁰ This passage is in the first volume. It is not to be found in the folio editions, but is interlarded in small type in the new editions, which, unfortunately, contain more of what Hawkins did not write than of what he did. If the venerable sergeant were to return upon this earth, I think he would look twice at some of those note-mongers, who had conspired with the booksellers falsely to charge him with being the father of such spurious offspring, and placarded the fair monument of his learning and industry with such obscenities. The book from which this queer doctrine has been extracted is, moreover, the worst book of English reports under which the shelf groans.²¹ It is a book with two names, and equally condemned by either.

Its character is to be found in Sir William Burrow's Reports, given not only by that judicious reporter, but also by Lord Mansfield, and his brethren. In one case he calls it "a

²⁰ 1 Hawk. P. C., c. 72, s. 2, n. 2 Leach's edit.

²¹ 8 Mod., sometimes called Modern Cases in Law and Equity.

miserable bad book, entitled *Modern Cases in Law and Equity*.”²² In another, he says, that when 8 Mod. was cited, “the court treated that book with the contempt it deserved, and they all agreed that the case was wrong stated.”²³ See, then, upon what crutches this lame cause hobbles.

Hawkins, (I don’t mean Leach’s Hawkins, but Hawkins’ Hawkins) refers by the letter (c) to three cases only for the doctrine of conspiring to impoverish by indirect means. And as Hawkins was only compiling from books of reports, and only digesting and arranging the law he found there, it is, after all, the authorities he vouches that are the law, not his book, which is but the index to them. To these cases then let us resort, and if they be clear we get rid all off ambiguity.

Rex v. Kimberly and Mary North,²⁴ was a false conspiracy to extort money by falsely accusing the party of being the father of a bastard child. The only question was, whether the mere conspiring, without carrying the conspiracy into effect, was a completion of the crime, or whether there must be a manifestation of the guilty intention by some other overt act; but it was held that the false and malicious intention, being the gist of the offense, was manifested by the very act of conspiring, which was of itself a sufficient overt act. What was there of indirect means in that case, if indirect be meant to express anything else than unlawful?

Rex v. Alderman Sterling and others,²⁵ was an *ex officio* information and concerned the king’s revenue. Sixteen or seventeen brewers, of London, were indicted for making orders that no beer called gallon beer should be sold but of a certain price. This order was averred to have been made with a view to impoverish the king’s excisemen, and bring them into hatred and contempt with the people, and to excite the people to mutiny and sedition, and to pull down the excise house, and to deprive the king of 118,000*l.* rent, which he had

²² 1 Burr. 386.

²³ 3 Burr. 1326.

²⁴ 1 Lev. 62.

²⁵ *Ibid.* 125.

by the tax upon this beer. The jury found them guilty of meeting and consulting to impoverish the excisemen, and of nothing more. It was moved, in arrest of judgment, that if any injury was done it was to be remedied by civil suit, and the excisemen being private individuals, that no public prosecution could be maintained. The judges so far admitted this as a general principle, but distinguished between this and other cases; because, they said, it concerned the king's revenue, and was therefore a public offense. The principle of the decision seems truly to have been this, that "*reges habent longas manus.*" Be that as it will, this cases proves clearly, that my interpretation of Hawkins' text is right; for if all confederacies by direct means to impoverish a third person, were guilty, there could have been no doubt in this case upon the special finding, and no room for the distinction drawn by the court, nor for any argument at all, whereas the court adjourned several times to hear further argument, and to have further deliberation.

This was the case referred to from the "miserable bad book," by the title of *The Tub-women v. The Brewers of London*. It seemed to puzzle the counsel in Philadelphia, and it puzzles us no less, to divine who these same tub-women could be.

The solution of the difficulty may be this: there was formerly in the exchequer a barrister called the tub-man, who was a king's counsel, and had precedence. It might have been his duty to file this information; and the cause, which would improperly have been entitled *The Tubman v. The Brewers*, was still more so by this reporter, whom the court of king's bench state to have been a mistater of cases, called *The Tub-women v. The Brewers*. It was about gallon beer. Gallons and tubs have some affinity, gallons being but the diminutive of tubs, *sic canibus catulos similes sic matribus hædos*. And between tub-men and tub-women there is but a syllable. A reporter so ignorant of men and things might mistake, as was his habit, and send forth the case in his report with this whimsical title.

The same case is related in Keble's Reports, where the various adjournments are stated, and the arguments on each day. The judges either did not well understand each other, or I do not well understand them. There are many confused dicta through the case, and I leave it to my learned adversaries to make what use they can of them.

The other cases referred to by Hawkins are for the purpose of showing that a conspiracy is of itself a crime, though never followed up to its execution. As they turn avowedly on the common law, I should wish, if I did not fear to fatigue the court with an argument already from necessity too long, briefly to run over the matter of them, in order to show more fully how they all fall under the definition of conspiracy at common law, on which we rely, and how remote they are, one and all, from the nature of the present charge; falsehood and malice will be found to be the ground of every one of them; or else maintenance of other men's quarrels, for the purposes of oppression.

The case of *Arundel v. Tregono*²⁶ was an action against a single defendant for a malicious indictment for stealing a bushel of wheat, and no question about conspiracy. The only question was, whether the court would intend what was not averred, that the justices had authority, and were of theoyer and terminer. *Throgmorton's case*²⁷ was similar, the question being whether they appeared to be justices of assise; for if they had no authority the party was never in jeopardy, and nothing being done to put the accused in danger, it was argued upon as merely an inchoate offense.

The *Poulterers' case*²⁸ is a leading one, and referred to throughout all the books. It therefore demands particular notice. A number of poulterers in London had conspired to indict one who had married a poulterer's widow, of robbery, and to have him, by such false and malicious charge, arraigned, adjudged and hanged. The bill was ignored under

²⁶ Yelv. 116.

²⁷ Cro. Eliz. 56.

²⁸ 9 Co. 55 b.

the direction of the court, who heard and perceived the falsehood of the testimony. The conspirators were indicted, overt acts were stated, such as procuring divers warrants of justices to forward their false conspiracy, etc. The argument in arrest of judgment was, whether the bill being returned *ignoramus*, the party accused was *legitimo modo acquietatus*, having not been acquitted on a trial. But what is most to our purpose is the note by Lord Coke at the conclusion:

"Nota reader. These conspiracies, punishable by law before they are executed, ought to have four incidents. 1st. It ought to be declared by some manner of prosecution. 2d. It ought to be maliciously for unjust revenge. 3d. It ought to be a false conspiracy against an innocent man. 4th. It ought to be out of court voluntarily."

How unlike are these words to the intemperate, incondite notion held to be law in Philadelphia. It is evident that Lord Coke considered himself bound by that definition on which we rely, and which he had, in another part of his writings, stated to be in affirmance of the common law.

The Seignior Grey de Groby's case²⁹ is stronger still for us, to show the ancient sense of the courts touching confederacies. It was, nevertheless, a star chamber case, and a rigorous one. A number of tenants of the manor combined to petition the king for redress in a matter where they claimed a right, and gave to one Perkins their names on *carte blanche*, to draw the petition according to the best of his judgment. They claimed a custom that the lord should be compellable to make an estate for life to the eldest son of the deceased tenant. The court decreed that the complaint was not censurable, because made without force, and to the king, who had power to redress. It was lawful, they held, as far as the claim of custom, or common, because each had an interest for himself; but the combination to claim tenure was maintenance, they said, because the tenure of one was not the tenure of the other. Now this applies favorably to our side of the case, for each journeyman has an interest

²⁹ Moore, 788. 4 Jac. 1.

for himself. They have used no force; and they have made their griefs known only to their kings, the masters, who had power to redress; and what they sought was nothing false nor malicious; nor were their means unlawful or indirect. The next is an erroneous reference, there being no such case in the page nor book referred to.³⁰

Rolle's Abridgement is the most conclusive of all that the present indictment cannot be supported upon principles of common law. I have searched Brooke and Fitzherbert, where there is not an instance of any conspiracy, except such as fell under the definition given by statute Edw. I. all turning upon false prosecutions or corrupt maintenance. Rolle, who compiled his Abridgment a century later, under the head of Indictment, and title Conspiracy, makes five subdivisions or sections.

"1st. He gives the definition by the statute Edw. I. on which we rely entirely. 2d. If two or more confederate together, that each of them shall maintain the suit of the other, whether the matter be false or true, although they do nothing in consequence, for such confederation is forbidden by the law. 27 Ass. fol. 139. b. adjudge. 3d. Also, if men confederate by oath in the same manner as above, *a fortiori*, they shall be indicted for that. 4th. The fourth section relates to false affidavits in chancery. 5th. If one swears or procures another to swear that a thing is true of his own knowledge and it be proved that he did not know it to be true, he shall be indictable, though the thing happen to be true."

This is all Rolle says of conspiracy; and from this it is clear that nothing is conspiracy at common law in which falsehood is not the principal ingredient. And the villanous judgment which followed every conviction, and which was the appropriate punishment of the *crimini falsi*, makes it clear, that wherever laborers or artisans have been indicted, it has been under the statutes, not at common law.

I have read this title through in English, in order not to shock the ears of the court. I shall, however, beg leave to repeat the second section in the original dialect, and to point out the misconstruction of the text in which the fallacy has originated:

³⁰ 1 Mod. 185, 186.

"Si deux confederate ensimul chescun de eux a maintenir l'auter lequel lour matter soit voier ou faux comment que ils mistont riens in ure encore ils poent estre indict de ceo, car cest confederation est defendu par la ley." 27 Ass. fol. 139 b.

Instead of translating the words "*lequel lour matter soit voier ou faux*," so as to express the true sense, viz.: whether the matter be right or wrong, the book-makers have overturned the author's meaning, and made that appear unnatural, which, in the ancient language of the law, is most clear and reconcileable to the whole range of precedent authorities. This section is nothing, in truth, but a corollary to the statutes of maintenance, and signifies merely that when two or more confederate to support each other falsely, or, which is the same, without regard to the truth or falsehood of the matter, then that confederacy is punished by the law, even though it has not been carried into effect. How vicious and absurd, then, is that interpretation, that says, all confederacies, whether to do good or bad, are highly punishable at common law.

The next authority is *The King v. Harrison and others*.³¹ There the indictment was for conspiring to charge one with the keeping of a bastard child, and bring him into disgrace; and it was held, that the false contrivance to defame the person, and cheat him of his money, was an offense, though the scheme had not been carried into effect. *The King v. Tracy*,³² was an indictment against a justice for putting a man in irons to extort money from him by false charges.

In *The Queen v. Best*,³³ which was a false conspiracy to charge a man with a bastard child, the true distinction was taken. It was held lawful to conspire to bring an offender to justice; but guilty to prosecute him, right or wrong; and it was debated and doubted whether to charge him falsely with a mere spiritual offense was conspiracy. What, then, becomes of the foolish saying that all confederacies are pun-

³¹ 1 Vent. 303, 304.

³² 6 Mod. 178.

³³ 6 Mod. 185. 1 Salk. 172. 2 Lord Raym. 1167 S. C.

ishable, whether to do right or wrong; for such, if not the words, is the principle asserted in Philadelphia.

Such are the authorities referred to by Serjeant Hawkins, whose silence alone would be an argument against any such indictment as this, and yet his name is surreptitiously used to countenance such absurdities.

If there be a few modern cases more lax, and where the principle has been shaken, it may be in some measure owing to these very corruptions, because as law works are in general compilations, an error soon multiplies, and that which has but one single source, and that in ignorance or mistake, being copied and transcribed, and interlarded into the writings of good and correct authors, does often deceive, and at length takes the imposing title of an authority.

I shall examine a few of the modern cases of conspiracy at common law. They will show that deceit is always essential; that in some sense or other they are all tinged with the *crimina falsi*. The King v. Brissac and Scott⁸⁴ was a false conspiracy between the captain and purser of a man of war to cheat the king by false certificates, and the various acts of fraud are distinctly averred. Rex v. Watson⁸⁵ was an information for a false agreement corruptly to charge the parish by giving a soldier ten pounds and a fat hog to marry a poor woman. The defendants being overseers of the poor, there also the overt acts set out showed deceit, falsehood and corruption. Rex v. John and Mary Sprogg.⁸⁶ The jury found the defendants guilty of falsely indicting Walter Gilman of forging a stamp. The averment in the indictment was, that the defendants did wickedly and maliciously conspire to indict the prosecutor, without adding falsely, and that according to the conspiracy, combination and agreement between them, before had, they actually did, falsely, wickedly and maliciously, without any reasonable or probable cause, indict him, and the indictment is set out. The

⁸⁴ 4 East. 171.

⁸⁵ 1 Wilson 41.

⁸⁶ 2 Burr. 993.

falsehood was pretty fully made appear; yet the argument in arrest of judgment was, that it should have been averred, in the first instance, that they did falsely conspire, etc., and, afterwards, that in consequence of that false conspiracy, they did falsely indict. The court adjourned from time to time, to consider upon this doubt, which I think is pretty strong proof how essential the falsehood is to the charge of a conspiracy, and without which they never would have been indictable in any shape.

The liberty I take in protesting against this indiscriminating adoption of the common law, will appear less adventurous if it be considered, that a great portion of the British empire, though governed by one monarch, and represented in one parliament, has not thought proper to adopt any part of it. The Scotch, less favored than the English in soil and climate, and other physical advantages, yet, as moral beings, are surely not inferior, and out of their mountains and their moors come men able to assume and maintain stations in the intellectual world before unoccupied or unclaimed. If the common law were like the divine system how could this be? Would not those who were formed under its luminous auspices as far transcend all others as truth excels error? for laws and religion are the fountains of education, from which national character is derived. But the Scotch, when broken by unsuccessful rebellion, and the disastrous chances of war, were brought to surrender their independent monarchy, their philly-beg and kilt, but never would consent to the laws or religious establishments of England. If, then, so important a portion of the British island can do so well without any part of the common law, can it be necessary for us superstitiously to adopt every part of it?

The Irish had the common law forced on them. Their melancholy history is now well understood. And from the scintillations of exalted genius which emanate from the ruins of Ireland, it may be imagined what a mass of excellence lies brutalized and benumbed by vicious institutions.

The Irish had an ancient code which they revered. It

was called the law of the judges, or the Brehon law. What it was it is difficult to say; for with the other interesting monuments of that nation's antiquity, it was trodden under the hoof of the satyr that invaded her.

Sir William Blackstone, in treating of the subjection of the Irish to the English laws, has had need of all his flexibility, and the authors he refers to are chiefly interested or official calumniators. After slightly touching upon the conquest, and planting (by which planting is meant, settling new adventurers upon the tombs of the slaughtered), he says, the inhabitants are, for the most part, descended from the English, which is a mistake, for one half of them do not use the English language, even at this day. "King John," he says, "went over, carrying with him many able sages of the law, and there, by his letters patent, in right of dominion of conquest, ordained, that Ireland should be governed by the laws of England." King John was a vile king. He murdered his brother's first born, and made a footstool of his neck for the servant of a pope; and if we judge of his sages by himself, we can believe nothing good of them. It is curious, that the same author, in the same page, says that the same laws which King John and his sages then ordained, had before been sworn to under Henry II. at the council of Lismore; yet so much were they detested, that afterwards Henry III. and Edward I. were obliged to renew the injunction. "And," adds the author, "at length, in a parliament holden at Kilkenny, 40 Edw. III. under Lionel, Duke of Clarence, then lord lieutenant of Ireland, the Brehon law was formerly abolished, it being declared to be indeed no law, but a lewd custom, crept in of later times." What they meant by a lewd custom, crept in of later times, I know not; but the statutes of Kilkenny, which came after it, are, of all laws that ever were enacted, the most atrocious; and lewd, indeed, must the custom be, that was not ill exchanged for them.

No wonder that the "wild natives," even in the days of Elizabeth, still kept and preserved their Brehon law, of which

its enemies are constrained to say, "that it was a rule of right, unwritten, but declared by tradition from one to another (like the common law), in which oftentimes, there appeared a great show of equity, though it was repugnant both to God's law and man's."⁸⁷

What happened in Ireland must happen here if we acknowledge ourselves subject to the common law of England. Whatever statutes have modified the common law in England to the exigencies of the times, not having force in this country, we should have the laws of the Tudors, and the Stewarts, unless we adopt something like Poyning's law, acknowledging our inferiority to the English, and making their laws our laws. The Irish, at one time, could make no laws in their parliament, that were not first certified under the great seal of England; so that the laws were made first, and the parliament held afterwards, to enact them. Is not this verifying the saying of Marquis Beccaria, that the judicial system of every country is two or three hundred years behind its progress in civilization. Are we bound to this by any, and what necessity?

From the books I see in court, I presume precedents will be quoted of English indictments of similar nature, concluding as at common law; and from that it will be argued, that combinations of journeymen are indictable at common law. But the answer to that is very obvious. The offense may be by statute, and by statute alone; and yet the indictment as at common law is the proper form.

When an offense is created by statute, and the statute gives no particular penalty, the indictment not only may, but must, be laid at common law, and a general judgment will be given, as of a misdemeanor at common law. Such precedents, therefore, cannot prove, that such combinations were ever supposed to have been indictable by virtue of the common law, otherwise than as contraventions of the English statutes, which surely have no force with us.

⁸⁷ Edm. Spencer's *State of Ireland*, p. 1513. Ed. Hughes.

In an Irish work³⁸ of great authority, which has been several times printed in England, there is a passage which very clearly illustrates this position. "If any tradesmen, artificers, laborers, or servants, shall combine and conspire not to work at rates fixed by the justices, this is a misdemeanor at common law, and punishable with fine and imprisonment." The fixing of rates by the justices is, by virtue of the statutes of laborers, in force in Ireland, being fixed by statute. The combining to violate that statute is an offense indictable as at common law, but would be no misdemeanor without the statute. In *Rex v. Crisp*,³⁹ which was for a statutable conspiracy, the indictment has this averment in the body of it; "*contra leges et statuta hujus regni angliae*," and yet concludes as at common law, viz.: *contra pacem*.

Through all the counts of this indictment, it is to be remarked, that there is but one overt act stated, which can, in any sense, be held criminal, and that is conspiring to refuse to work unless under certain conditions. I should like to know what law compels a man to work upon terms not advantageous or agreeable to him. As to those counts which contain no overt act, but merely charge the defendants with conspiring to impoverish by indirect means, and impoverishing by indirect means, I scarcely think them worth an observation. They have all the kinds of uncertainty which renders an indictment a nullity. I shall, however, leave the indictment to be analyzed by my learned colleague, who will do more justice to the subject. The observations which the novelty and importance of this cause have drawn from me, having, on mere preliminary topics, gone to too great lengths, a few general remarks shall close what I have to say.

Every conspiracy must be a trespass, that is, an illegal act; but every trespass is not an indictable offense, but, in most cases, the remedy is by civil action. The only injury that can be complained of, if there be any, must be of a private nature, whether it be to Whittess or the masters. For

³⁸ Bollon's Justice, lib. 2, c. 5, sec. 24.

³⁹ 2 Doug. 441. Trem. P. C. 82.

instance, where servants or apprentices are seduced, there the remedy is by civil action, not by indictment.⁴⁰

Before the mutiny act in England, soldiers bound to serve the king in his wars, might quit his service, unless *flagrante bello*; but the masters here seem to think the journeymen bound to serve them through life, for whatever wages they choose to grant them. The one party must, in that case, be more than kings, and the other less than subjects.

Whitess had become one of their society, and agreed to their regulations. They are charged with combining not to work with Whitess (for such is the substance of it) till he should pay the fine he had agreed to pay, for breaking their rules and orders. What is there indictable in all that, supposing it ever so true. That they will not work for the employers who employ him. What is that more than saying they will not work along with him who is not contented to abide by them.

I think the law of Solon applies to this case, which declared, that in times of public division no man should be neutral. That law has, perhaps, more wisdom than appears at first view. It tended to obviate the evils of deception and dissimulation. It prevented matters from being carried to extremity, as it gave each party a clear knowledge of its own strength, and furnished a measure by which the success of the struggle might be foreseen, and useless contest avoided. But how is it here? Whitess violates the rules and ordinances to the observance of which he had bound himself. He goes to the adversaries' camp, and because they will not go with him they are indicted. If all the masters were on one side, and all the workmen on the other, the contest must soon end sufficiently to the advantage of the employers. If the majority of the workmen were content with their wages, the majority would be harmless; but if an individual will seek to better himself at the expense of his fellows, when they are suffering privation to obtain terms, it is not hard that they leave him to his employers; and the most inoffensive

⁴⁰ 3 Burr. 1321.

manner in which they can show their displeasure is by shaking the dust off their feet, and leaving the shop where he is engaged. If they do this without violence or fraud, without breach of the peace, disorder or violation of any contract, duty, or moral obligation, it is burlesque to call that a conspiracy indictable.

If it be clear, from all these authorities, that such indictments are not conformable to our laws or constitution; that none such were ever known in England till the time of the statutes of laborers; and that none such were ever prosecuted to judgment in America, because there never were any such statutes; then I shall conclude with the words of Judge Tucker, an author worthy of confidence, "that neither the law of England, nor that of any other country, can have any obligation in this State; and that no offense created by statute in England can, for that reason, be deemed an offense against the United States; and that all statutory offenses against the laws of England, are therefore only to be regarded as offenses in that kingdom, and not as having any existence either in the State of Virginia, or in the United States." The same may surely be said of New York, where the whole body of the English statutes has been at once repealed, and where the statutes which created the offense here indicted, never were in force at any time.

I have only now to apologize to the court for the unavoidable length of my argument, to return my thanks for its patient indulgence, and to commit my clients to its protection; leaving to my learned associate to complete the argument which I have left so imperfect.

MR. COLDEN FOR THE DEFENDANTS.

Mr. Colden. I shall think it sufficient to establish these two principles as law:

1st. That a conspiracy to do any act, is not indictable unless the act to be done is unlawful; and,

2d. That it must appear upon the face of the indictment that the act to be done is unlawful; or, according to an au-

thority to which I shall by and by refer the court, whatever circumstances are necessary to show the act unlawful must be set out, which indeed is but a corollary from the first proposition. It will follow that if the indictment which is now before the court, does not charge the defendants with a combination or confederacy to do an unlawful act; or if the indictment does not show that the act which it charges them with having conspired to do was unlawful, the indictment must be quashed.

As to the first principle which I have mentioned, it appears to me a self-evident proposition, and I shall not attempt to offer any argument to support it until I hear that the counsel opposed to us mean to deny it. If they do they must intend to maintain its converse, that is to say, they must endeavor to establish that every combination or confederacy, to do a lawful act, is an offense. It seems to me that it is only necessary to advert to what would be the infallible consequences of adopting such a principle to show its absurdity. If a conspiracy, whether to do right or wrong, be unlawful, the parties to every association would be offenders; all our religious, benevolent, charitable, and political societies would be violations of the law. And I do not know why upon this principle carried to its extent, men who unite their means and exertions for mercantile gain, would not be criminals.

The numerous counts in the indictment will, for the purposes of the argument which I am about to offer, admit of a classification; and I shall consider them under the following arrangement: The first, second, third and eighth counts may form one class; the fourth, fifth and ninth counts form a second class; and the sixth and seventh counts will have a separate consideration.

The first, second, third and eighth counts have each a similar recital, by which the offense charged in each of these counts against the defendants, is introduced. This recital states that the defendants, intending to form a club, and to make illegal by-laws, and to extort money, did conspire.

It is to be observed that there is no charge against the de-

defendants. This recital is mere matter of inducement. It is not said that they conspired to form a club, or to make illegal by-laws, or to extort money; but on the contrary, the conspiracy is charged to have taken place subsequently to these intentions, which, from aught that appears on the indictment, were harbored by the defendants, separately and individually, before the conspiracy was formed. Nor is it stated that the conspiracy was for either of these illegal purposes, if they were illegal, but for totally other objects. It cannot be considered, I think, that the defendants are to be put to answer these recitals as criminal accusations, because there is nothing in the recitals which charge anything against the defendants as an offense. On the contrary, all that is said in the recitals is but to introduce the charge of conspiracy which immediately follows the recital in each count.

But let us suppose the matter contained in the recitals was put in the form of a charge in the most positive and direct manner. As, for instance, if the indictment had said, that the defendants did intend to form a club. First, let me ask, is an intention of any kind, though it be to commit ever so atrocious an offense, punishable by the common law? I think I may venture to answer that it is not. Then much less can an intention to form a club be so. And however immoral it may be in an individual, or any number of individuals, to have an intent to pass illegal by-laws, or to extort money, it is an immorality for which they are not answerable to any human laws.

Another objection to this part of the indictment is, that if the public prosecutor had intended to make this intent to pass illegal by-laws, and to extort money, a part of the substance of his charges against the defendants, he should have set out in his indictment what illegal laws they did intend to pass, that the court might see that they were illegal; and he should also have stated by what means they did intend to extort money. If there was a direct charge that the defendants did pass illegal by-laws, and that they did extort money, the indictment could not be supported without a specification

of the laws passed, and of the means of extortion, as I shall by and by show to the court when I come to consider the counts which I have arranged in a second class. Certainly, then, this charge of an intent, and that introduced by way of recital only, can never be sufficient.

I think it will appear from what I have said, that in these recitals there is no crime sufficiently charged against the defendants. And I beg the court to observe, that the recitals are entirely independent of what may be called the substantial parts of the indictment. As they can in no manner assist the charge of conspiracy, so neither can they derive any support from that charge. The recitals, and the charge of conspiracy, are as little connected as if they formed separate counts. Indeed, the recitals are in opposition to the charges; for the recitals imply that the defendants intended to do one thing, and they are charged with having conspired to do another. They intended to form a club to make illegal by-laws to extort money, and they conspired not to work in the same shop with one who was not a member of their society; nor with any one who infringed their rules, until he paid his fine; nor with any master who employed more than two apprentices.

Dismissing the recitals to these four counts, I shall proceed to an examination of the direct charge contained in each, with a view to show that the acts which it is said the defendants conspired to perform are not illegal acts, and therefore a conspiracy to do these acts is not indictable.

The first count charges, that the defendants conspired and agreed that they would not work with any journeyman who was not a member of their society. The second, that they would not work with any one who infringed their by-laws. The third contains the same charge, with the addition that they would not work with an infractor of their laws till he paid a fine. And the eighth count charges, that they would not work for any master who employed more than two apprentices.

Here let it be observed, that the defendants are not charged

with having conspired to do any act, much less an unlawful act. The agreement among them, as the indictment states, is not to act. Now will it be said that it would have been unlawful for these defendants or any other set of men, to have come to a resolution, or to an agreement, if you please, that they would not work at all? Let us know where is the law that says a man once a laborer shall forever remain so; nay, that he shall forever labor. There is no such tyrannical rule in this country. And if men may resolve that they will abandon their trade and live idle, why may they not make a qualified resolution of this nature? Why may they not say that they will only work under circumstances agreeable to themselves?

But to examine the substances of the charges in these respective counts more particularly. So far from having been anything illegal or immoral in the conspiracy or agreement to which these defendants were parties, the court will find that their confederacy, and the rules which they adopted, were not only legal but highly meritorious.

Like most other societies of the same nature, the journeymen shoemakers' society is a charitable institution. They raise a fund, which is sacred to the use of their helpless or unfortunate members, and to the relief of the widows and orphans of their departed brethren. Their by-laws are, each member shall contribute to this fund. And to induce every one to join the society, while by his labor he may make something to spare for their fund, they refuse to work with anyone who is so wanting in charity as not to join them. And as a sanction to their laws, they have also declared that they will not work with any who shall break their by-laws, that is, who shall refuse to pay his dues, till he has paid a fine. Who will say that an association of this nature is illegal? What human laws can presume to punish acts, which, according to the laws of God are deserving of rewards even in heaven? or can it be said that the resolution not to work for a master who employed more than two apprentices, was unpraiseworthy? The masters were in the habit of crowding their shops with more

apprentices than they could instruct. Two was thought as many as one man could do justice by. The journeymen shoemakers therefore determined to set their faces against the rapacity of the masters, and refused to work for those who were so unjust as to delude with the promise of instruction which it was impossible they could give. In England, the legislature has interfered on this point, and has by statute limited the number of apprentices which certain tradesmen may take.

It is to be observed, that neither of these counts charge that the design of the defendants was to raise their wages. And though it should be admitted that a conspiracy to raise their wages would subject the defendants to an indictment, yet I doubt if any authority can be found to support an indictment for charges like these.

The fourth, fifth and ninth counts form another class, my objections to which I shall proceed to submit to the court.

The fourth count charges, that the defendants, intending to injure E. W. conspired, by wrongful and indirect means to impoverish him, and hinder him from following his trade, and that they did, in pursuance of their conspiracy, indirectly hinder him from following his trade.

The fifth count varies from the fourth only in this, that it does not charge that the defendants effected the design of their conspiracy. And the ninth count is similar to the fifth, except that it charges that the conspiracy was to injure, by indirect means, certain master workmen who are named.

Now it may well have been that the defendants intended to injure the persons named in these counts, by indirect, yet by perfectly lawful means. If they had agreed that they would work better or cheaper than the persons named, this would have been an indirect means of injuring them. If they had combined in the invention of some improvement of the cordwainer's art, which should have entitled them to a patent, this would have given the defendants a monopoly which could not fail of being an indirect means of injuring all who were not sharers in it. If they had agreed to increase the number

of master workmen in our city by inducing those who are now settled elsewhere to take their abode with us; or, if the defendants had agreed that they would no longer work as journeymen, but establish themselves as masters. All these would have been indirect means of impoverishing and injuring other persons engaged in the trade. But will it be said that indirect means like these would be unlawful means? I am sure it will not. It follows, then, that the defendants are not charged by either of these counts, with a conspiracy to do an unlawful act.

But if we should say that by the terms wrongful, wicked, and indirect means, are to be intended unlawful means, then there remains the important objection, that the indictment does not specify the necessary circumstances to show that the intended means were unlawful.

In Hale's History of the Pleas of the Crown, it is said, that an indictment is nothing else but a plain, brief, and certain narrative of an offense committed by any person, and of the necessary circumstances that concur to ascertain the fact and its nature.

In Bacon's Abr. tit. Indictment, G. where the court will find a number of authorities quoted to the same point, it is said that an indictment must expressly allege everything material in the description of the substance, nature, and manner of the crime; for no indictment shall be admitted to supply a defect of this kind.

Again, in the same book (*ubi supra*), it is said that the whole fact ought to be set forth with such certainty that it may judicially appear to the court that the indicters have not gone upon insufficient premises.

Conformably to these principles, it has been decided, that an indictment of perjury, not showing in what manner, and in what court, the false oath was taken, is insufficient. So in *The King v. Mason*,⁴¹ it was adjudged, that an indictment, charging the defendant with obtaining money by false pre-

⁴¹ 2 Term Rep. 581

tenses, was insufficient, as it did not show what the false pretenses were. In the case of *Rex v. Munon*,⁴² an indictment for procuring a note by false tokens, was held bad, because it did not specify what the false tokens were.

The idea of indicting these defendants upon these general words, it is very probable has been taken by the person who drew this indictment from an expression in Hawkins' Pleas of the Crown, which I have no doubt will be often quoted by the adverse counsel; for I believe no precedent for such an indictment can be produced. Sergeant Hawkins says, that a person may be punished for confederating "by indirect means to impoverish a third person." But does it follow that by these general expressions, Hawkins meant to say that the confederacy would be unlawful, though the proposed indirect means were lawful? Much less can it follow that he intended to say that it was not necessary to specify the means in the indictment. Suppose there were a statute which enacted, that to impoverish another by indirect means, should be a crime, would it be sufficient to pursue in the indictment the words of the statute, and to omit in an indictment in such a statute what were the indirect means to which the defendant had resorted?

If general charges of this nature could be supported, no man put to answer them would know from his accusation how to prepare for his defense; for he might not learn, till he heard it from the mouths of his accusers on his trial, what were the circumstances alleged against him.

Reserving any further observations on these counts of the second class till I have had the pleasure of hearing the learned counsel concerned for the prosecution, I shall proceed to submit to the court some remarks on the sixth count. Supposing it to be unlawful for tradesmen to conspire to raise their wages, let me beg the court to remark that there is no such charge against the defendants in this count. The charge is of a very different nature. It is, that they agreed that they would not work under certain prices. Now let me

⁴² Stra. 1127.

ask, if these persons had agreed not to work at all, is there in this country a law to compel a man to work if he chooses to remain idle? What law is there to punish the lazy lawyer, the negligent merchant, or sleepy parson? If there be none for persons of these classes, by what authority can you punish the idle shoemaker? And if a man may lawfully determine to live in idleness, why may he not make qualified his resolution not to work but on certain conditions? Why is it not lawful for him to say I will work if you will pay me at a certain rate, but if you will not do this you must go without my work? There is no law in this country, and I believe I might say there is no law on earth, which denounces as illegal such conduct. There is, therefore, no charge in this count to do an illegal act; but objections which have been made to other counts again occur as applicable to this. In the language of an authority I have quoted, "the circumstances necessary to constitute the imputed crime are not set out." One of these circumstances is, that the defendants were not content to work for usual wages. Yet there is no specification of what the usual wages were, nor is it shown that the prices which they had limited for themselves were over these usual wages. It will not, I presume, be contended that it would have been a crime if the defendants had agreed that they would be content with less than the usual rates. How does it appear, then, that their prices were not below what the customary compensation? We must recollect that the authorities to which I have already referred the court, show, that in an indictment, nothing is to be taken by intendment. It is worthy of remark, that the framer of this indictment was so conscious that he was not charging the defendants with a conspiracy to do an unlawful act, that he has departed from the usual phraseology in this respect, and omitting the word unlawfully, has contented himself with alleging that the defendants wickedly and corruptly conspired.

I have said that this count does not expressly charge the defendants with a conspiracy to raise their wages; and that

no such charge can be made out by implication; and that of course the allegation that they would not work under certain prices, cannot amount to a charge that they intended to raise their wages above the usual prices. But I shall admit, for the sake of argument, that this indictment does contain, in legal form, an accusation that the defendants did unlawfully conspire to raise the price of their labor above what were the customary wages at the time of the conspiracy. And this will bring us to an important consideration; because I shall contend, and I hope to satisfy the court, that neither by the common law of England, nor by the laws of this country, was such a conspiracy punishable; for by neither the one nor the other would it be a conspiracy to do an illegal act.

A conspiracy to do an act which is forbidden by the law, is a conspiracy to do an illegal act, and therefore such a conspiracy is a crime. And every indictment for such a conspiracy must be an indictment at common law, and not an indictment upon the statute; because the conspiracy is a common law offense; the statute only giving to the act to be done that unlawful character which is necessary to make the conspiracy illegal.

It is only on this ground that conspiracies to raise wages are indictable at common law in England. For I believe I may venture to assert, that no instance of an indictment for a conspiracy of this nature can be found that was prior to the statutes passed in England for regulating the wages of her craftsmen.

I have traced these statutes for regulating wages as far back as to the beginning of the fourteenth century, 33 Edw. I. Other statutes on the same subject were passed in the reigns of Rich. II., Edw. III., and of Elizabeth, *vid. Keb. stat. 69. 2 Reev. His. Eng. Law, 388, 389, 4 Burns' Just. 164.*

These statutes, or some of them, made it unlawful, not only for an individual craftsman to ask or receive more than a specified price for his labor; but it made it also illegal for an employer to give more than at the established rates. According, then, to the principles for which we contend, it having

become by statute an illegal act for one or more individuals to raise their wages, a conspiracy to do that act became an offense punishable by the common law of England.

There is not an authority in the English books which is not consistent with this principle. The case of *The King v. Wise*, in 8 Mod. whether it be a good or bad authority, so far from being against us, is in our favor; because, it appears from the report of that case, that the indictment was grounded on the statute, though it concluded at common law. The text of *Hawkins*, and the notes upon it, are all reconcilable to this doctrine, as are also all the authorities which are quoted in *Hawkins* to support the principles he there lays down.

In the *Crown Cir. Comp.*, page 257, at the foot of an indictment at common law for a conspiracy among workmen to raise their wages, is given, in a note, the statute on which the indictment was founded; thereby manifesting, I think, that the author of that book thought that no such indictment could have been supported without the statute.

In *Douglas' Reports*, 424. *The King v. Smith and others*, is the case of an indictment for obstructing the execution of powers granted by statute for making a horse-towing path on the River Thames, which it is decided need not, and ought not, to conclude against the form of the statute, on the ground that anything done in contravention of a statute is an illegal act, and as such punishable at the common law.

It is in vain, therefore, for the gentlemen, to show us English precedents for conspiracies to raise wages, concluding at common law, or to cite to us authorities which say that such indictments may be maintained. We admit all this. But we say, that without the English statutes, which make the act which is the object of the conspiracy illegal, no such indictments could be supported in the English courts.

But a second position which I have taken, and which I shall now attempt to support, is, that a conspiracy of this nature may have been criminal by the common law of England, independently of her statutable provisions, yet that part of her common law was never in force in this country.

I presume that I may take for granted, that this country, when it was settled by our English ancestors was to be considered, in relation to the parent state, as a desert and uncultivated country, claimed by right of occupancy only. And that the laws of colonization which apply to emigrations from a parent state to such a country, were applicable to those who first planted themselves on these shores as subjects of the English monarchy. For if this were to be considered as a conquered country, our common law would be the customs of the Mohawks, or of the Dutch ancestry; or if this were a ceded country, we should have the act of cession or treaty to appeal to, to ascertain what laws were thereafter to govern.

If we are to be considered as the representatives of colonists, claiming by right of occupancy, our ancestors brought with them only "such of the laws of the parent state, as were applicable to their own situation, and the condition of an infant colony."

If it were part of the common law of England, when our ancestors emigrated to this side of the Atlantic, that workmen should not combine to raise their wages, who can say that this was a part of the common law which our forefathers brought with them? Will it be contended that such a rule was applicable, to their situation, or to the condition of an infant colony? No man will contend, I think, that a law of this kind can be beneficial in a society, until its members become numerous, and its arts and manufacturers have arrived to a state which they can only attain after they have progressed through ages. The infant colony, then, established by our ancestors, was not governed by the law now attempted to be enforced, if it were a part of the English common law. And if it was not the law of the colony in its infancy, no such law could afterwards be imposed on the colonists by the customs or usages of the mother country. And it certainly has not been by any legislative act either of the parent state, or of the colony.

That the whole of the common law of England is not in force in this state, cannot be denied. The constitution of the

state adopts a part of the common law only. By the thirty-fifth section of the constitution, it is declared, that such parts of the common law of England, as made a part of the colonial law on the 19th of April, 1775, should be law in this state. Now, then, we call upon the adverse counsel to show us that this common law of England, which they would now enforce here, was ever a part of our colonial law. To satisfy the court that it was so, they should have shown that at some time it had been enforced. But although hundreds of years have passed, there is no instance of an attempt to enforce such a rule. There is not even a tradition of there having been a prosecution of this nature. Can it be believed, that combinations of this kind have not before existed? And can there be stronger evidence that this was never a part of the colonial or common law of the state, than that no such prosecution under the jurisdiction of our courts has ever before been heard of?

I have had an opportunity of examining the records of the criminal proceedings of our tribunals for a great number of years back. I have found an information which was preferred in the year 1741, against certain bakers, for combining not to bake bread but on certain terms. This indictment, however, concludes contrary to the form of the statutes. And it appears that no judgment was ever rendered upon it, so that it cannot be appealed to as an authority on either side; or if it is in favor of either, it must be the defendants, because it appears that the crime there charged was laid as an offense against some statutes, and not as an offense at common law.

I have applied these observations to the sixth count, because this is the only count on which the question, whether it be unlawful for workmen to raise their wages, can arise. I must detain the court a few minutes longer with some observations on the seventh count, which is the only one that remains to be examined.

This count must follow the fate of the sixth count, because every objection which has been made to that count, applies

to this. But there are some other objections to this count which I will briefly notice to the court. The charge is, that the defendants conspired and agreed that they would endeavor, by threats, to injure E. W. and prevent his working. It is not said that the defendants would prevent E. W. from working; nor is it stated what kind of threats were to be made use of. It is not stated that their resolution to threaten E. W. was ever communicated to him, or that he ever knew anything about it. How, then, could this resolution injure him? If there be any force in the rule, that whatever circumstances are necessary to constitute the crime must appear, certainly this count, when tested by this rule, must be bad.

Finally, there is one objection which applies to this as well as to some other of the counts, which is, that it does not appear with sufficient certainty, who were to be injured by the conspiracy. This objection arises out of a rule which is laid down in Hawk. P. C. c. 25. s. 71, "that not only the defendants, but all other persons mentioned in the indictment, must be described with convenient certainty." The last-mentioned counts aver, that the conspiracy was to injure the defendants' masters, or other citizens. Let me ask, who are the defendants' masters? Will the court recognize any set of men as the masters of these defendants? No: They are poor, honest, laboring workmen, it is true, but not slaves.

I have taken up more of the time of the court with this discussion than I expected to have done. But I will not further trespass on your patience by any long apology for having done so.

MR. RIKER, FOR THE PEOPLE.

Mr. Riker: May It Please the Court—Two days have been consumed in argument by the defendants' counsel. We shall not require so many hours. Our positions are these:

1. That the common law is the same in this country as in England, with no other exceptions than those specified and declared.

2. That by the common law of England, the conspiracies stated in the indictment are criminal.

3. That the counts are good both in form and substance.

But even if they were not so, this motion ought not to prevail. Indictments for conspiracy are never quashed. For this, I refer to the case cited from 8 Mod. 321, although I do not mean to rely upon that book generally as the highest authority, nor to press it much upon the court.

If one count alone in an indictment be good, though all the rest be bad, the court will not quash the bill. Nor is the court bound in any case, *ex debito justiciæ* to quash any indictment, but will in this case use its sound discretion. (Doug. 703. *Grant v. Astle*, 3 Bac. Abr. tit. Indictment, page 573, letter K. 4 Hawk. 83.)

If there be a doubt, it is the soundest course not to quash an indictment, as it precludes investigation, and prevents a decision in the last resort.

As to the general question of the adoption of the common law, my argument is this: The province of New York was a conquered and ceded country, and it is not disputed that in such case the ancient law remains until changed by the new sovereign. All that is incumbent upon us is, to show that that was done, and that in place of the former laws of the colony, the common law of England was established, and fully and entirely adopted.

To prove that the common law of England was so established as the law of the colony of New York, I rely on the evidence of the journals of the assembly.

The patent to his Excellency the Governor (page 5), contains a grant of the common law of England, and every defect or imperfection of their law was to be supplied by recurrence to, and adoption of, the laws of England.

As to what one of the counsel for the defendants has urged with so much wit, vivacity, and subtilty, touching the unfitness of the common law, I appeal to the very authority of those fathers of our revolution whose shades he has invoked. In that great act wherein we justify our revolution, they are

so far from complaining in terms of invective against the common law, that they set it forth as their best birthright; and their loudest complaint is that they were deprived of its valuable protection and its beneficial provisions; and if that privation was so great an evil as to be a valid cause of a war and a revolution, we must conclude that they entertained a very different sentiment respecting it from that of the counsel who has appealed to them.

Since, then, the sovereign can legislate in a ceded or conquered country, the patent of the King, according to the authority of Lord Mansfield, is conclusive.⁴³

"The constitution of the State of New York runs thus: And this convention doth further, in the name and by the authority of the good people of this State, ordain and declare, that such parts of the common law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the nineteenth day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall from time to time make concerning the same.

"And this convention doth further ordain, that the resolves or resolution of the congresses of New York, and of the convention of the State of New York, now in force, and not repugnant to the government established by this constitution, shall be considered as making part of the laws of this State; subject, nevertheless, to such alterations and provisions as the legislature of this State may from time to time make concerning the same."⁴⁴

"In the body of this section are these exceptions, viz.: that all such parts of the said common law and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to maintain or establish any particular denomination of Christians, or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government or prerogatives, claimed or exercised by the King of Great Britain, and his predecessors, over the colony of New York and its inhabitants, or are repugnant to this constitution, be, and they are hereby abrogated and rejected."

The only cases, then, in which the common law shall not prevail are here defined; but from these very exceptions it

⁴³ Cowp. 204.

⁴⁴ Laws of New York, p. 15, s. 35.

results that all the principles of the common law which are beneficial to the public, are in full force. And which of them can be more so than those which go to preserve the community from such combinations as would, if permitted, lay the community at the mercy of the conspirators, by enhancing the price at their will of the necessary articles of life.

This conspiracy, unnaturally to force the price of labor beyond its natural measure, is as dangerous as any kind of monopoly, and if it be tolerated, as well may regrating, forestalling, and every other pernicious combination.

Suppose all the bakers in New York were to refuse to bake till they received an exorbitant remuneration. Suppose the butchers should enter into a similar combination, and if there be impunity for these, why shall not all other artisans do likewise? What will become of the poor, whose case the counsel takes so feelingly to heart? The rich, will, by their money, find supplies; but what will be the sufferings of the poor classes?

Suppose that some rich speculators, acting upon similar principles, should, in a cold winter, combine to purchase up all the wood, and refuse to sell it but at an extravagant advance, should we have no law to protect the poor against such oppression? And would it be argued, that without an express statute the law could furnish no remedy. As such acts would be against the public good, and immoral in a high degree, they would therefore fall under the animadversions of the general law; and as offenses against the whole community, be subject to public prosecution.

There are duties which every man owes to the society of which he enjoys the benefits and protection, which never can be detailed, but must be regulated by acknowledged principles of judicature. A baker, therefore, who lives by the supply of the public, shall not abuse that public by a sudden interested and malicious withholding of his ordinary supplies; but though it were otherwise, and that every individual was permitted, as far as in him lay, to distress his fellow-citizens, yet if he combines with others to do so, he is guilty

of a distinct and well defined offense, that of an unlawful conspiracy, for which he is indictable and punishable.

We are as far as the defendants' counsel from saying that when any man finds his trade unprofitable, or prefers another occupation, or another course of life, he is not master of his own will; nor that he would in such case be indictable.

Mr. M'Nally⁴⁵ imputes great part of the distresses of the poor in Ireland to such combinations, which shows, that they who would prevent them, are more the friends than the oppressors of the poor.

In Jacob's Law Dictionary, the same doctrines as we contend for are laid down in an elementary manner as settled law; and it is there said that the statute 2 and 3 Edw. VI, c. 15, which is made against such combinations is still in force, but is seldom resorted to in this case; the proceedings being usually by indictment for conspiracy. In the Crown Circuit Companion, there is a precedent of an indictment for a conspiracy to raise wages. It is at common law, and in page 280. There is a note subjoined, which says, that an indictment may be drawn from that form on the statute, by pursuing the words of it and concluding contrary to the form of the statute in this case made and provided; which shows the offense to be indictable either on the statute or at common law. The authority of Hawkins goes further, and says, that though these acts be offenses against the statutes, yet the form of the indictment must be at common law. So in *The King v. Harris*,⁴⁶ it was held that the defendant was punishable by a common law indictment for the breach of orders made by the king and council; those orders being pursuant to an act of parliament. In *The King v. Waddington*,⁴⁷ the charge was engrossing and forestalling hops. There were several statutes referred to on the subject of engrossing, all of which were then repealed; and it was held that the repeal of those statutes only left the offense as it was at common law, and

⁴⁵ M'Nally's Just. title Combination, p. 383.

⁴⁶ 4 Durnf. & East, p. 202.

⁴⁷ 1 East's Rep., p. 147.

that upon general principles of immorality and public detriment, it was an indictable offense.

Blackstone, treating of offenses against public trade, says, that buying up large quantities of corn or other dead victuals with intent to sell them again, must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any commodity with intent to sell it at an unreasonable price, is an offense indictable and finable at the common law, and the general penalty for the three offenses of engrossing, regrating, and forestalling (the statutes respecting them being all repealed by 12 Geo. III, c. 71), is, as in other minute misdemeanors, fine and imprisonment at the discretion of the court. Now, as there is no difference in the principle, whether it be to raise the price of provisions or of other necessary articles by undue means, it is in vain to argue that they are not equally punishable at the common law.

The crime of which the defendants stand indicted, is well defined by Christian in his notes to the Commentaries, where he says, "Conspiracy is a confederacy to injure an individual, or to do acts which are unlawful or prejudicial to the community." The case of the Cock Lane Ghost, shows this still stronger. For there the conspiracy was to injure another by a mere phantom, which could have no reality. The case of *The King v. Kimberly and Mary North*, shows further, that conspiracy itself is an offense, though no other act be done but that of conspiring merely.

In the case of *The King v. Eccles*, reported in a note by the compiler of the Crown Circuit Assistant, there was an indictment for conspiracy by indirect means, to impoverish one H. Booth, and to deprive him of the exercise of his trade as a tailor. It was moved in arrest of judgment that the charge was too general, because it did not specify any particular act, nor state by what means the conspiracy was effected: but the court held that it is not necessary to set out the means; the means of the conspiracy are evidence;

conspiracy is the gist of the charge; and even to do a thing which is lawful in itself, by conspiracy is unlawful. The means are immaterial, if there was an illegal combination.

Mr. Colden has not, in stating the various counts in the indictment, given them their full effect. One of them, for instance, states, that the defendants compelled Corwin to discharge Whittess until he should have paid a fine imposed upon him. The counsel have given no reason why, if there be even one count good, the whole indictment should be quashed.

Macklin's case⁴⁸ was an indictment for conspiring to ruin the prosecutor in his profession as an actor.

In the same book is a precedent against serge weavers, for refusing to work for a master who had employed a man contrary to certain rules entered into by conspiracy.

In the precedent given by Wentworth, no other overt act is laid of any of the imputed charges than the mere act of conspiracy itself. The facts stated, and which will be proved in this case, are of a nature more hurtful to trade and to the public, than any set forth in the printed cases or precedents. Such for instance is that of binding themselves not to work for employers who should have more than two apprentices; and regulating the work and wages of shoemakers and others, and imposing restraints and regulations too violent to be endured.

In this precedent, the fourth count is the same as the last in the present, and concludes "to the prejudice of divers masters," etc.

Another indictment against curriers, contains counts exactly similar to those which the counsel here would have quashed for insufficiency.

Why then arraign the common law with so much invective, or why dispute its principles when they are so beneficial and protecting? Why not give them efficacy in this country, when their tendency is to the public good? We have hitherto been happy and safe under the administration of the common

⁴⁸ C. C. 159, 160.

law. And those who framed our constitution upon the downfall of British superiority and empire, still found nothing more advantageous to establish as a code than the ancient common law. Guarded with the exceptions of what alone was exceptionable, the doctrines of supremacy and prerogative, and any other principles, if such it contained, repugnant to our constitution, certainly, the restriction of illegal combinations to raise the price of articles of necessity, is as congenial to our constitution as any other parts of the common law.

Let not Sampson then apply his force, blindly to pull down a temple which it has required so many ages to build up. Let it stand and flourish until its rights become obnoxious or pernicious; until something more venerable or more sacred can be substituted in its stead. Our constitution has established it subject to such alterations as it shall be found to require. If alterations become necessary, let them be duly considered and adopted, but let not the whole fabric be shaken or destroyed.

MR. EMMETT, FOR THE PEOPLE.

Mr. Emmett. I shall briefly dismiss a considerable part of the argument offered on the other side; not for any deficiency of respect to the counsel from whom it has proceeded, or to the learning and research which he has displayed; but because I do not consider it entirely relevant to this cause, nor properly addressed to this court. To the legislature, or a convention, the observations we have heard upon the absurdities of the common law, and the impropriety of its being received as a part of our legal code, might be correctly made if they were in truth well founded; but they appear to me extremely misplaced when offered to a court, the judges of which are bound and sworn to administer justice according to that common law, and who certainly have no authority to shake the foundations of the system under which they themselves are constituted. Lest, however, I should be thought by my silence to acquiesce in the justice of these observations, let me ask the learned counsel how he proposes to fill the void which would be cre-

ated in our jurisprudence by the entire and indiscriminate abrogation of the common law? Has he digested a better code, and is he prepared to submit it to the world? If he has, I shall for one willingly take it into consideration; but most assuredly I shall not, without the most obvious and certain benefits, be induced to part with that to which our habits of thinking, reasoning, and acting are peculiarly formed, to which our institutions are all adapted, and upon the improvement of which and the application and the fitting of it to the constitution and wants of society, the wisdom, industry and talents of the ablest, most judicious and upright men have been laboriously, unceasingly and immemorially employed. If there be in any other state or country a disposition to abandon the common law, and try the experiment of creating a new code of civil conduct; let them take the lead; I will not rashly follow. If, indeed the experiment should succeed, and a greater portion of justice and social happiness be the result, this state, I hope, will be ready to adopt it; but until then we shall best consult our interests if we adhere to what we know and to what has been perfected by successive adjudications, filtered through successive generations, and purified from its original incongruities; which, however, have been erroneously brought forward and exposed in this discussion as if they had actual existence and effect. Indeed, the learned counsel has done more; he has raked through the statute books for every extravagant absurdity or folly that the ignorance or weakness of our forefathers may have placed there; and he has endeavored to fix them as a stigma on the common law; with what propriety I shall not stop to inquire, but shall take the liberty of observing that no advantage can accrue to the community, from general satires on the law of the land, delivered in a court of justice.

It is also insisted upon, that many parts of the common law of England were never adopted here; and from the supposed uncertainty of what may not have been adopted, it is endeavored to deduce an argument that so much relates to conspiracies of this description. The weakness of this reasoning

is obvious; but in truth there is no uncertainty as to what parts of the common law have been adopted, and what rejected. The constitution has spoken on this subject. In the 35th article it is

“Ordnained, determined and declared, that all such parts of the common law as may be construed to establish or maintain any particular denomination of Christians or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by the King of Great Britain and his predecessors over the colony of New York and its inhabitants, or are repugnant to that constitution, be, and they are hereby abrogated and rejected.”

These are the only exceptions. In every other respect, the common law which could have been applied on the 19th of April, 1775, to any transaction within this colony, if the case calling for its application had then occurred, is now in force. No matter whether any such case had actually presented itself, or whether such application of the law had then been made; the only point to be considered is, whether, if it had occurred, there was anything arising out of the colonial situation of this country which would have rendered the common law of England inapplicable to such a case. In illustration of this I may be permitted to state what I have been informed of on very respectable authority. It is to be observed that by the same article of the constitution, such parts of the English statute law as formed part of the law of the colony on that day, are continued as the law of this state. Under that provision Mr. Jones, since the Revolution, took, for the first time, the defense of twenty years adverse possession in an ejectment, although it had never been done or thought of while this country was a colony. But, nevertheless, the defense, when urged, was admitted, because it might have been applied and used before the 19th of April, 1775. Although at the first settling of the colony, or in its infant state, the common law may have found no subject upon which particular parts of it could operate, yet it was the birthright of the colonists as a permanent rule of justice, which, at every new period of advancement and progress, would adapt itself to the rising exigency. If no

precedent could be produced of such an indictment as this antecedent to the revolution (which however, the counsel on the other side have themselves disproved by the production of an original record), that might be attributed to the paucity of manufactures and manufacturers, which rendered such a combination almost impossible and unknown; as in truth it was in England for centuries. But the opposite counsel must go further, and show that if it had occurred, there was something arising out of the colonial situation of the province, to render the common law inapplicable to the punishment of such an offense. This has not been attempted.

It is, however, contended (and this is the last intrenchment of my adversaries on their grounds of objections), that even in England this is not an offense at common law, but only growing out of particular statutes. It, therefore, becomes my business to show that this position is unfounded. The learned counsel, in support of it, seems sometimes to contend, that there is no case of conspiracy at common law, but where it is accompanied with the *crimen falsi*; as falsely prosecuting in a court of justice, or falsely imputing to a third person something infamous or injurious to him. That there are conspiracies of this kind is certain, and the appropriate punishment affixed to them shows that they are of a very aggravated nature. They induce an infamous punishment, by which the convicted person becomes disqualified from giving evidence in a court of justice. There are, however, also conspiracies not infamous, in which the object to be accomplished is only the wrongful injury of a third person. An instance of this occurs, very apposite, though apparently somewhat trivial it is to be feared, in the case of *The King v. Cope*, where several were indicted for a conspiracy to ruin a card maker, by causing grease to be put into the paste, which had spoiled the cards. But to advert to a more important and atrocious case—that of *The King v. Delavel et al.* depends on the same principles of private injury and public police and morality. There an information was granted against Sir Francis Blake Delaval and others, for a confederacy to assign over Miss Catley, then an apprentice to a

musician, by her own consent, for the purpose of prostitution. The case before the court is also very intimately connected with public police and prosperity; and surely the argument cannot be favorably received, which, if pushed to its full extent, would prove that a crime so erroneous and profligate as that of Sir Francis Delaval and his associates, is unpunishable by our law. Many other cases might be quoted, which, with those I have already mentioned, and those I shall of necessity cite in the course of my observations, clearly establish that the *crimen falsi* need not enter into conspiracy, as a common law offense. There is another and much more comprehensive description of what constitutes that offense, which we, on behalf of the prosecution, derive from Hawkins' Pleas of the Crown, where that learned author lays it down that "there can be no doubt but that all confederacies whatever, wrongfully to prejudice a third person, are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person," etc. To this I add a *fortiori*, and what follows from all the cases, that a conspiracy wrongfully to prejudice the public, is also highly criminal. In the editor's note on this passage of Hawkins, it is stated as flowing from the principle laid down in the text, that journeymen confederating and refusing to work unless for certain wages, may be indicted for a conspiracy, notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution, for the offense consists in the conspiring, and not in the refusal; and all conspiracies are illegal although the subject matter of them may be lawful. For this is cited 8 Mod. 11 and 320, and the opposite counsel triumphantly remark that the note is Mr. Leach's production, and 8 Mod. most despicable authority. The true consideration, however, is whether the inference in the note is fairly deduced from the principle in the text, and whether that principle be in itself correct. As to the principle, it seems to me indisputable. Even if it rested only upon the authority of Hawkins, it would rest upon the first authority in the Crown Law, and one which will not mislead any judge who adopts it.

But he also cites different authorities which support his position, and strongly bear upon this case. The most important is that of *Rex v. Sterling* and seventeen others.⁴⁹ That was an information against them, that they, with divers other brewers, etc., did factiously and unlawfully assemble themselves and conspire to impoverish the excisemen, and gave orders that no small beer, called gallon beer, should be made, etc. This conviction was supported, inasmuch as the conspiracy tends to the public, because it concerns the king's revenue; and also, inasmuch as it being averred and found to be factiously and unlawfully done, that well enough explains what kind of impoverishment is intended. To this case it is objected, that it was decided for the prosecution, on account of the king's revenue, and that it is founded on a star chamber decision, which in itself pollutes the authority. As to the first objection, the king's revenue is only mentioned as indicating the manner in which this conspiracy tended to the public, which was one of the principles adopted; the other was, that a conspiracy unlawfully to impoverish the excisemen, is also criminal. This case, therefore, shows, that either a conspiracy unlawfully to prejudice other individuals, or the public at large, is an offense. As to the star chamber decision, that only went to one point hereafter to be considered, that an overt act need not be done to complete the offense, which is likewise supported by the authority of 9 Co. the Poulterers' case, and many other decisions; but I must also observe that although the summary and arbitrary mode of proceeding in that court has rendered it justly odious, yet some of the best authorities we have in our reports, particularly in Coke's Reports, are star chamber cases.

The principle, then, which Hawkins lays down, and for which we contend, is fully supported by authority, and indeed has never till now been called in question. I shall, however, beg to refer those who wish to draw a line of distinction between English and American law on this subject, to 3 Wilson's

⁴⁹ 1 Lev. 125. 1 Sid. 174. 1 Keb. 650.

Lectures, 118, where, treating of the law as it is in this country, he says, by that law (the common law) "all confederacies whatever, wrongfully to prejudice a third person, are highly criminal." The principle then being settled, let us examine whether Mr. Leach's inference from it in his note be just. He cites 8 Mod. against which an outcry is raised on the authority of Burrow. That there are many cases defectively reported in that book is certain: but there are also many others the correctness of which has never been doubted. It is relied upon by the very latest writer on Crown law, and that where he lays down the nature of conspiracy in a manner very applicable to our case. 1 East's Crown Law, 462. "An indictment lies wherever either the conspiracy is entered into for a corrupt and illegal purpose, or for the use of unlawful means to effect a legal purpose, although such purpose be not effected." In the case of *The King v. The Journeymen Tailors of Cambridge*,⁵⁰ the doctrine is broadly laid down; and in support of it is vouched the case of *The Tub-women v. The Brewers of London*, which has puzzled not only the opposite counsel, but those who in a neighboring state have examined this question, to know where that case is to be found, or what it means. My learned friend, however, has settled into the belief that it means the case of *The King v. Alderman Sterling* and others, already commented upon. In this I concur, though not for the reasons he assigns. For it having been tried and decided in the King's Bench, the Tubman of the Court of Exchequer could have nothing to say to it; and even if he had, I do not see why its being conducted by an officer called the Tubman of that court should entitle it to be called the Tub-women's case. The truth, I presume, is, that the small beer called gallon beer, mentioned in the report as being sold to the poor, was hawked about as similar beverages are in many countries, and sold in the streets by women, who, from their occupation and the vessel in which was contained the article they sold, were called Tub-women. And when the brewers of London combined not to make or permit any more such beer to be

⁵⁰ 9 Mod. 11.

made, by which the occupation of these women was ruined, it is very probable that their interest and activity against the brewers made them conspicuous personages in the cause, and procured that name to the case. Be that, however, as it may, the case of *The King v. Sterling* undoubtedly contains the principle that supports the case in 8 Mod., that any conspiracy to do a wrongful act, tending to public injury, or the impoverishment of third persons, is indictable. But it is not on the authority of 8 Mod. of the Tub-women's case alone that the particular application of that principle is founded. In Hawk., b. 2, c. 26 (vol. 4, p. 85), the author, speaking of informations, and when they may be granted, recites, among other offenses, "conspiracies to impoverish a certain set of lawful traders;" and if an information lies, inevitably an indictment will. In 12 Mod. 248 (case 427), anonymous, leave was given to file an information against several plate button makers for combining by covenants, not to sell under a set rate. Per Holt, C. J., "It is fit that all confederacies by those of a trade to raise their rates, should be suppressed." In Bolton's Justice (which the learned counsel has cited, and the authority and accuracy of which I willingly admit), vol. 2, p. 16, it is laid down that any such conspiracy is an offense at common law, notwithstanding there are statutes to enable justice to fix those rates, and punish any one exacting more. In 1 Keb. 650 (the report of *Rex v. Sterling*), it is laid down by Hyde, C. J., that the very conspiracy, without an overt act, to raise the price of pepper, is punishable, or of any other merchandise. In the *Liber Assisarum*, 27 Edw. III, p. 138, 139, there is set down a list of the matters to be inquired of by the inquests of office in the King's Bench, and among others, different conspiracies. The nineteenth article runs thus: "Also of merchants, who by covin and alliance among themselves, in any year put a certain price on wools, which are to be sold in the country, so that none of them will buy, or otherwise pass in the purchase of wools beyond the certain price which they themselves have ordained, to the great impoverishment of the people," etc. Here is an authority pretty nearly

as ancient as any that the most profound researches of the learned counsel have discovered, which does not depend on either the plague or the statutes of laborers, which marks a conspiracy to raise the price of an article of merchandise as an indictable crime, independent of any statute; for I challenge both my learned adversaries, to find any statute or ordinance bearing upon this offense. This authority is dependent in all its parts on the common law, and puts the gravamen on its true footing, "the great impoverishment of the people." Wool is mentioned only because it was one of the most important articles of merchandise in those days, and for a particular illustration, in the same way as pepper is specified in Keble; but the principle is of universal applicability. This authority is, I think, perfectly conclusive; but I must, before I dismiss this point, allude to the record brought into court by one of the opposite counsel. It is an information against journey-men bakers for a conspiracy not to bake till their wages were raised. On this they were tried and convicted before the revolution; but, as the counsel says, it does not appear that any sentence was ever passed, from which he concludes that judgment was arrested. This undoubtedly is a *non sequitur*. The criminal may have become penitent, and the object of the prosecution having been obtained, judgment may never have been moved for; besides, it is well known that those records have been in such confusion that no one can tell what has happened in almost any cause. But if judgment was arrested, let me point out the fault in the information on which it may have happened. It concludes against the form of the statute, whereas it should have concluded at common law, even if there had been a colonial statute regulating that subject, which does not appear. The gentlemen themselves allow and claim the benefit of this doctrine; and indeed it is settled on the same principle as governed the case of *The King v. Smith*,⁵¹ which they have cited, that where powers are created by statute, it is an offense at common law to obstruct the execution of them, and such an indictment ought not to conclude against

⁵¹ Doug. 441.

the statute. On account of this defect, perhaps, judgment was never had; but the learned counsel, by relying on this record, admits that his clients' case is similar to that of the bakers', and contends that such a combination on their part is not indictable. Observe, then, and let me illustrate the doctrine he maintains. Suppose the bakers of this city were to combine not to bake a loaf of bread till some demands, as to the assize, were complied with; and that the butchers were at the same time to combine not to sell a pound of meat till some object of theirs should be gained, what would be the consequence? A misfortune worse than pestilence would instantly befall the city. And are we to be told, that not only the individuals of those classes of men, to whom, in the general distribution of employment, society has confided the care of providing for its most important wants, may singly abandon their duty; but that those classes en masse, without any intention of permanently relinquishing or changing their occupations, but merely as a measure of extortion from the necessities of others, for private interest, may lawfully conspire together to inflict the most terrible calamities on the community; and this is called the mere exercise of individual rights, and the toleration of it is considered as sound political economy! But no. Individual rights are sufficiently secured by letting every man, according to his own will, follow his own pursuits, while public welfare forbids that combinations should be entered into for private benefit, by the persons concerned in any employment connected with the general welfare; in which combinations they would make common cause against the community at large; and in which the individual rights of those in the combining classes, who may wish to be industrious, are most grievously violated; because, if they were permitted to follow their pursuits, it would tend to relieve society from the extortions of the conspirators. These combinations are an infringement of that tacit compact which all classes reciprocally enter into, that when they have partitioned and distributed among them the different occupations conducive to general prosperity, they will pursue those occupations so as to con-

tribute to the general happiness; and they are therefore at war with public policy. But when it is further considered that they are always accompanied with compulsory measures against those of the same class or trade, who would willingly pursue their occupation with industry and tranquility, they are most tyrannical violations of private right, and inevitably tend to the unjust impoverishment of multitudes, either of those against whom the confederacy is directed, or of those who are forced into it, or devoted by it, for exercising their own individual rights, and refusing to co-operate with the unlawful association.

The authorities already laid before the court cannot be strengthened by additional references. I shall, however, quote one more author, because his name and character are familiar to some of the persons indicted, who now hear me, and may therefore tend to convince them that they have offended against the laws and policy which must be maintained in every well regulated state. The authority I allude to is M'Nally's Justice of the Peace:

"At common law, all confederacies and combinations wrongfully to prejudice any person, or the public, are offenses punishable by indictment. Combinations among masters and workmen of various descriptions, have been productive of the most serious consequences to the trade and manufactures of Ireland, have been recognized as unlawful by the legislature, and are punishable by several acts of parliament. It is a melancholy truth that repeated combinations to regulate trade and advance wages, have raised the home manufactures to so erroneous a price that most articles, whether for use or ornament, are now imported from England or from Scotland, to the great impoverishment of this country, and to the ruin of the artificers themselves, who, from necessity, the result of their own illegal conduct, are forced to abandon their native land, the most productive in the world, where they might have lived in ease and plenty, to seek a precarious subsistence in Great Britain or America."

In this passage I freely acknowledge the writer has not set forth what are the most important causes of the languishing trade and manufactures of Ireland; he dare not do it, for they are connected with the jealousies and oppressions of its tyrant and rival, and with the general misrule of that ill-

fated land. But what he has set forth is so far true, that such combinations have impeded in that, and must in every country impede and interfere with its manufacturing prosperity.

Much has been said about the villianous judgment, as if by this prosecution it was intended to revive and enforce that horrible punishment; but the counsel on the other side well know that this is a groundless insinuation. The villianous judgment is now in every case obsolete; but according to the best authorities, it never could have been inflicted on such an offense as this, and most undoubtedly it never was. Hawkins expresses his opinion that the villianous judgment could only be inflicted when a conspiracy was formed to accuse another of some matter which might touch his life; and he expressly says, the contrary has never been decided. Where the conspiracy is accompanied with the *crimen falsi*, it is subject to an infamous punishment, including pillory; and the person convicted is disqualified from giving evidence in a court of justice. But where the confederacy is unaccompanied with that crime, and is only calculated to prejudice a third person or the public, the punishment is merely fine and imprisonment, without any such disqualification or infamy. And permit me to observe, that the correctness of this gradation in the punishments is calculated to wipe away the imputations of folly and injustice, which have been very improperly cast upon our common law.

I now proceed to the examination of the more particular and technical objections to this indictment, which I do under great disadvantage, as business in another court unfortunately detained me there during the greater part of the argument of my learned adversary, who chiefly occupied this ground, a circumstance which I doubly regret both on account of the professional information I should have acquired had I been present, and because it disqualifies me from meeting his arguments with the precision they doubtless deserve and require. The District Attorney has, however, discussed those objections with so much force and learning, that I

shall feel myself justified in being very brief. There is a general remark, which, as it seems to me, renders every other nearly unnecessary: this motion cannot succeed if there be any one count good; and there are some of the counts on which I presume the court can entertain no doubt—indeed all of them have been drawn conformably to the most approved precedents. The fifth and ninth are *verbatim*, according to the precedent in *Rex v. Eccles*,⁵² which the Court of King's Bench in England held good on motion in arrest of judgment; and the third count has every formal requisite that was ever contended for, and can only be questioned on the general principles, that have been, I hope, refuted. Objections, however, are in fact taken to every count, and they all flow more or less directly from the general proposition with which that gentleman commenced his argument; that every unlawful conspiracy (that is, I presume, every indictable conspiracy) must be to do an unlawful act, and the unlawful act must appear such on the face of the indictment. This proposition, however, is not correct, if by the expression "to do an unlawful act" is meant to effect an unlawful purpose. East, in the passage I have already cited, says, an indictment lies wherever either the conspiracy is entered into for a corrupt and illegal purpose, or from the use of unlawful means, to effect a legal purpose, although such purpose be not effected. But even this position does not appear, according to some authorities, sufficiently accurate; for the very act of conspiracy is held to be itself unlawful, and the entering into it is using unlawful means to effect a purpose, and is therefore punishable whether that purpose be lawful or not. This doctrine is expressly laid down in the case so often and disrespectfully alluded to by the opposite counsel, that of *The King v. The Journeymen Tailors of Cambridge*:⁵³ "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it." In

⁵² Dog. C. C. Ass., p. 123, note.

⁵³ 8 Mod. 11.

the same book, p. 321, the proposition is a little more qualified, though substantially the same: "a bare conspiracy to do a lawful act to an unlawful end, is a crime, though no act be done in consequence thereof." The position, however, in its fullest extent, is recognized in the case already cited of *Rex v. Eccles*: "Conspiracy is the gist of the charge; and even to do a thing which is lawful in itself, by conspiracy, is unlawful." Taking the position of *East*, or either of those in 8 *Mod.* to be correct, the indictment is free from the objections urged against it on this ground; for the end to be accomplished in the 1st, 2d, 3d, 6th, 7th and 8th counts, unlawfully and unjustly to extort great sums of money by means of forming and uniting themselves into an unlawful combination, and of making unlawful and arbitrary by-laws for the government of themselves and other workmen in the same trade, is most obviously unlawful; and the end to be accomplished as stated in the fourth and fifth counts, unjustly and unlawfully to impoverish Edward Whittess, and to hinder him from exercising the trade of a cordwainer, as well as that set forth in the ninth count, by indirect means to impoverish the master shoemakers therein named, are, as I think, equally unlawful. Indeed it appears to me that they even fall within the rule laid down by the learned counsel himself, and that a conspiracy to accomplish any of those purposes, is one to do an unlawful act, and that the unlawful act sufficiently appears on the face of the indictment.

It is also objected to all the counts but the third and fourth, that they contain no overt acts. The attorney for the district has sufficiently answered this, and the multitude of precedents and cases he has produced, must be considered as conclusive. But if it be true as laid down in 27 *Ass.* 44, 9 *Co.* 56 b, 1 *Lev.* 126, 1 *Salk.* 174, 8 *Mod.* 321, and in a multitude of other places, that bare conspiracy is punishable without anything having been put in use in consequence of it, or any overt act done, it surely cannot be required to set forth in the indictment an overt act, when one may not have been committed, and when its existence is not

necessary to the completion of the crime. At all events, as is laid down in all those places, as well as in *The King v. Eccles*, conspiracy is the gist of the crime, the overt act is only matter of evidence, and it is clearly settled in the case of *The King v. Horne*,⁵⁴ that whatever circumstances are necessary, to constitute the crime imputed, must be set out; but that anything beyond that is surplusage and unnecessary. In high treason, indeed, from the nature of the offense, and for the benefit of the party accused, it is expressly enacted, that the overt acts, or in other words, that the nature of the evidence shall be set forth in the indictment; but that is an exception from the general rules of pleading, and need not be adopted in any other case.

To the fifth and ninth counts it is also objected, that the means of impoverishing Whittess, or the masters, are not set forth, but expressed in the vague terms by indirect means. This has been decided in England to be sufficient in the case so often alluded to, of *The King v. Eccles*,⁵⁵ on the principle I have just laid down; "but the court held that it is not necessary to set out the means; the means of the conspiracy are evidence; conspiracy is the gist of the charge." The bare conspiracy being a crime, let us suppose that in fact the thing agreed upon in such a conspiracy was to impoverish a person by indirect means, the detail of which had not been matured or settled; and that the very words, "indirect means" had been used in the agreement entered into, how should this crime be stated in the indictment, but according to the truth of what took place? And how can the gentleman say on this motion, but that what I have stated is the very fact we shall prove? The learned counsel, however, in support of his objection, relies on *The King v. Mason*,⁵⁶ that an indictment, charging the defendant with obtaining money on false pretenses is insufficient, if it do not show what the false pretenses are. The distinction between the two cases

⁵⁴ Cowp. 683.

⁵⁵ Dog. C. C. Ass. 123.

⁵⁶ 2 D. & E. 581.

is, after a moment's consideration, obvious. To obtain money by a mere lie, is not indictable, as "lend me some money; I want to pay a debt for which I am dunned," when no such debt or dunning had any existence in fact. There must be fraud or cheating, as well as falsehood in the pretense. The nature of the pretense then enters as an ingredient into the formation of the offense, or (to use the words of Mr. Marryatt, in his argument for the defendant in the case cited) "the pretense is of the very essence of the crime, and constitutes the offense." The specific pretense must therefore be spread on the record, that the court by inspection may judge whether it be such as constitutes an offense. In conspiracy, on the contrary, the means do not constitute the offense; that consists in the conspiracy independently of them. They then are only matter of evidence, which therefore need not be set forth; but the false pretenses are of the gist of the crime, and therefore must be specifically stated.

I have thus discussed all the objections which occur to me, lest I should seem to shrink from an investigation that has been so triumphantly provoked. I must, however, suggest to the court, that indictments for conspiracies are never quashed; but the parties put to plead or demur, or to avail themselves of their objections in arrest of judgment. This is laid down in one of the cases already cited, *Rex v. Edwards*.⁵⁷ The opposite counsel treat this rule as arbitrary and foolish, and indeed, deny its existence. I believe it, however, to be founded on a wise principle, and not peculiarly framed for conspiracies, but for a number of other offenses: that principle I find in *Hawkins* "yet it seems that judges are in no case bound *ex debito justitiæ*, to quash an indictment, but may oblige the defendant either to plead or demur to it. And this they generally do, where it is for a crime of an enormous public nature, as perjury, forgery, sedition, nuisances to the highways, and other offenses of the like nature." It is also a rule with respect to the quashing of indictments, laid down in the same case of *The King v. Edwards*, "that if the matter be

⁵⁷ 8 Mod. 321.

doubtful, the defendant must plead or demur," or, in the language of Lord Mansfield, in *Rex v. Wheatly*,⁵⁸ "the indictment must be grossly bad to have the court quash it at once." That this indictment, if at all bad, is not grossly so, and that the matter, if not clear for us, is at least doubtful on the other side, must be apparent to every one who reflects that our adversaries have found it necessary to apply to the task they have undertaken, so much talent, learning and research, and to consume an unprecedented length of time in urging and enforcing their objections.

MR. SAMPSON IN REPLY.

Mr. Sampson. In this unnatural effort to sustain monopoly on pretense of putting down monopoly, and supporting an accusation upon principles that establish guilt in the accusers, the learned counsel have put on an air of confidence, which shows that nothing can dismay their courage. My learned countryman seems to exult in the authority of his great reputation, like a giant about to run his course. But in a cause strong as ours is, I fear him not, though armed but with a pebble from the brook. However great the influence of his well-earned fame and zealous countenance, it is all but show, but shadow against substance. I might apply to him what the sententious poet Lucan said of the great Pompey, "*stat magni nominis umbra.*" I might remind him, that on the eve of his defeat, Pompey the great did crown his brows with boasting laurels, and hung his tent with gaudy wreaths of triumph. If I were at that happy time of life, when I could go to school, I should be proud to take my lessons from my learned friend; but not such lessons as he gives us now in favor of his clients; because, I know that were he in my place, he would give better reasons, and better arguments, the other way.

He and his learned colleague, have arraigned me for rashly censuring the sublime sources of their common law. I have, it seems, blasphemed the temples of barefooted Druids, in argu-

⁵⁸ 1 Sir W. Bl. Rep. 273.

ing here for working shoemakers. I have not treated with becoming reverence, the trial by the corsned, wherein the life of man, his guilt, his innocence, were made to turn on his salival glands; and he was only innocent who could best masticate and swallow a lump of dough,⁵⁹ and not be choked with it. I have spoken disrespectfully of trial by the holy cross, a game not half so fair as blindman's buff, on the success of which, death and eternal infamy awaited. I have not revered that trial by hired bruisers, who, by thumps of sand bags were to try whose cause was holiest in the sight of God, where he alone was justified from violence and malice, whose champion thumped his enemy to death, or till he cried out craven: or he who could endure such thumping from sunrise to sunset, and not cry craven: that also proved the innocence of him who hired the body to be thumped. I have not spoken with religious awe of cudgel playing, that ancient mode of duelling by battle, when the lord or knight who had the broadest back and thickest skull, was sure to turn out the elect of God, and have his adversary hanged for being beat. And yet all this was common law, and that so much, that the good citizens of London were, by special charter, exempted from such process. Now, if what the learned counsel says be true, that all this common law rests only in abeyance—may be revived and visited upon us whenever the occasion offers—then he should quit his books and learn the cudgel. He cannot tell how soon he may be called upon, for all of it may not be yet so formally abolished as not to be again revived, seeing two centuries of nonuser is not sufficient evidence to show it is not law.

I have spoken rashly of that *judicium dei*, called the ordeal; where guilt or innocence was proved according to the

⁵⁹ It was called *buccella diglutienda*, and was of bread or cheese. Spelm. Glass. 439. The form of administering this morsel by the priest was thus: We beseech thee, O Lord, that he who is guilty of this theft, when the exorcised bread is offered to him to discover the truth, that his jaws may be shut, his throat so narrow that he may not swallow, and that he may cast it out of his mouth, and not eat it.

rank of the accused, by fire or water, in person or by deputy-persons of high condition, judged innocent if they could hold three pounds of red hot iron in their hands, or walk bare-foot and blindfold over nine red hot plough shares.

I have made too free with that most righteous trial, where for small offenses, the hand was plunged in boiling water; for capital ones, the arm up to the shoulder; that is to say, where a fore quarter of the man was boiled to try the fact, whether the rest was good; when he whose flesh could not resist the boiling caldron, was put to death. Of these and all such things, I have spoken too disrespectfully; because these sublime doctrines are to be found not only in the laws of Ina, the Mirror, and in Bracton, but in more modern works laid down as law. I know it well, so late as in the reign of John, some grants are to be found to bishops and to clergy of this sacred right of boiling and roasting Englishmen, granted by the name of *judicium ferri atque ignis*.

Now if the argument be true, that common law, however obsolete, may, when occasion offers to call it from its slumbering holes, be here revived, why not revive it all. No part of it can be more obsolete, than the doctrine of indicting men for trying to get wages in this free country. It is more than obsolete, it never yet was done at any period of our history, and it is worse than useless to do it now. It is asked, have I digested any better code. Truly I have digested none at all. On my admission to this bar, I took an oath, and took it with sincerity and truth, to uphold the laws and constitution of this country. I think I do my duty in upholding them against such doctrines, as would add to all the faults of youth, the dotage of old age. Perhaps, if I made laws, they would be foolish ones; but there are others who could make wiser ones. Not being called upon, I have made none. A man may speak of a defect which it is not his business to cure. I may see a disproportion of feature in a picture or a statue, and yet not be a painter or a sculptor. I may see when a leg or arm is broken, although I have not skill to set a bone. Though I prefer our laws to every other, I do not, therefore, think them

like those of Providence, but I think them **great** improvements upon the common law, said to be so like that system. This surely is extolling them enough. I stand entirely upon the laws of this our country and the wise decisions of our own courts. I ask for nothing more than that our own judges be free to exercise their wisdom and intelligence, and be as little trammelled as may be with antique perversity. I wish to see their judgments shine as lights to other nations. If foreign tribunals be too self-sufficient or too ignorant to quote them as authority, I esteem them not the less for that. I will refer to our reported cases, and ask which are those that put our jurisprudence in the most exalted point of view, those liberal and reasoned adjudication on commercial and maritime contracts; those turning upon the general laws of nature and nations, and of natural justice, when our judges have borrowed their purer lights, not from Druids nor Monks, nor from the northern hive, but from the edicts of wise princes, from the matured codes of intelligent and enlightened people, the writings of learned and philosophical authors, from general principles of acknowledged right. Not from those crude antiquities which I am blamed for censuring, but after which, some learned gentlemen will seem to yearn. If our judges had once pronounced that such indictments as the present could be supported by virtue of the common law of England, I should then give my opinions with more measure; but at present I have their universal silence in my favor, and, therefore, I speak boldly. The various authors cited by the gentlemen, touching the passages in Hawkins so much relied upon, I have examined, and hope successfully to show their true signification. I do not think our adversaries have given a sufficient answer to overthrow the plain interpretation I have given them. I still rely on the original authors for the construction I have made, and to show that the true sense has been corrupted and misunderstood. By reference to Rolle's Abridgement, I trust I have shown, that Hawkins could not mean that strange assertion, that there was no difference between a combination to do good and bad, between an honest

combination and a false conspiracy to do a wicked crime. And touching combinations to impoverish by indirect means, without showing anything unlawful in the means: besides that common sense is shocked by such a doctrine. I flatter myself the explanation I have given, will be agreeable to this honorable court, as rescuing the law which it administers, from the reproach of folly and injustice. The gentlemen have quoted a number of authorities, most of which we cited. They endeavored to strengthen their case by multiplying references; but I refer the court once more to those authorities, and I repeat what I have said before that in the ancient writers nothing can be found to warrant such positions, and that the modern authorities are nothing more than echoes of one single error; for whether it be annotations upon Hawkins, commentaries upon the Commentaries, the Crown Circuit Companion, the Crown Circuit Assistant, Wilson's Lectures, Wentworth's Pleadings, Burn's Justice, or M'Nally, or East, or any of them, they are all founded on, and all refer to, that miserable book, that *alias dictus*, which the learned counsel has scarcely ventured to defend, which the King's Bench and that learned reporter Sir James Burrow, have justly stigmatized, and which I say ought to be weeded out of our libraries as a very rank weed which scatters its bad seeds, and has already overrun the soil and choked all reason. This is the evil of all paradoxes, their strangeness captivates attention, and having the attraction of the marvelous, they are seized upon as curiosities, and preferred by the idle and affected, to things more simple, and more solid, more true and profitable.

The gentlemen in their rounds of references, have driven us, as Tony Lumpkin drove his dear mamma, so many turns round Crackscull common, still never quitting the point he started from.

I have said that all the conspiracies mentioned in the books, unless those in the "miserable bad book,"⁶⁰ or those erroneous sayings derived from it, turn upon the evils expressed in the declaratory laws touching maintenance, champerty, or false

conspiracy. I do not think the cases relied on though taken in their full extent and latitude, show anything to the contrary. Two of the three cases cited by Hawkins as instances, being false conspiracies, show this explicitly, viz.: falsely to indict a man, or to charge a "man with a bastard;" and Hawkins refers to conspiracies only, which are infamous, and such as subject the criminal, if not to the villainous judgment, at least to infamous punishment, as pillory and branding; so that, unless the counsel will maintain, that our poor honest journeymen are worthy to be pilloried or branded for not working with Edward Whittess (who had first entered into their society and then separated from them), the authority of Hawkins, proves for them less than nothing. The third case which Hawkins cites, is then the only remaining stay-rope of their arguments, and it would be piteous to adopt such a case as an authority. For unless we had tub-women or tub-men, excisemen and excise houses, and above all, a king who had a revenue of 180,000*l.* sterling of duties upon small beer, we can scarcely view it as a case in point. It is *sui generis*, and anomalous. The variety of opinions amongst the judges who ruled it, the irregular finding of the jury, and the peculiar reasons assigned, viz.: that the impoverishing the excisemen, "tend to the public," and affected the king's revenue, all these considerations show that it has no affinity with any other cases under the English laws, and certainly it bears in no shape upon the dispute between our journeymen shoemakers here in this city of New York, and their employers, nor shows in any shape which of the two contending parties is most to blame, or whether either of them. The present is a contestation where one side endeavors to get as much wages for lawful labor as it can; the other, to get as much labor for as little money as it can. And again I would advise all who take part in politics or in elections in this country, to beware; for if it be the law that all confederacies, whether the object of them be good or bad, are common law conspiracies, what man is innocent that ever went to an election, or gave a vote, with others of his party, for governor or president. I

have shown that nothing in the English law, repugnant to our constitution, or our statutes, can be law, and I have argued that this prosecution is repugnant to our constitution, because it is founded on the doctrine of unequal rights: and that it is repugnant to our statute, which defines conspiracy in terms so express, that both the learned gentlemen have chosen rather to be silent on that head, than to attempt an answer. They affect to speak as though they had not heard us mention that statute, which is of more importance to this case, of more imperative authority within this city, and this state, than all the laws of England, and of all the universe besides.

To show that inconvenient English laws were not enforced even when this country was a colony, I have cited the sound theory of Judge Tucker, and also the case of the two presbyterian clergymen, from Smith's New York. There is indeed in the close of that same history an account of a dispute touching the erecting a court of equity, by the legislative power of the colony, with the opinion of Mr. John Randolph of Virginia, who censures the blindness of the New York lawyers in following a common error, that the statutes of England were in force here. "If we wade into the statutes," he says, "no man can tell what the law is; it is certain all of them cannot bind, and to know which, was always above my capacity." Now, Sir John said right in that, but even he, with all his wisdom, would have given to the blind lawyers of New York a very curious code: for if the statutes of England were none of them binding, and the common law was their only rule, most strange results would follow. Lands would have been still unalienable by deed or will; they would still be burthened with the feudal tenures and all their evils; they would have had courts of chivalry, knight service, and villenage, with grand and petty serjeantry, aids, wardships, primer seisin and relief, and all the feudal tenures and their incidents, which at the restoration of King Charles were abolished by a single statute. My object in reviewing these antiquities was to show them absurd and unfit for our consideration. And further also, that even by the common law the present indict-

ment could not be sustained, not even in England. The authority of Hawkins, I am willing to admit, is great, where it applies, and is not misrepresented; but, as Lord Mansfield said in speaking of Sir William Blackstone, it is not always safe to trust great names too far, for such will often be in contradiction with each other; for instance, Lord Coke makes the acquittal of the party accused by false conspiracy a requisite towards indicting the conspirators, but Hawkins, in the book and chapter cited, lays down the law as generally applicable to all conspiracies, whether they be executed or not; in which last case there could be neither trial or acquittal. "Who shall decide when doctors disagree?"

Let us then give to Hawkins the only rational construction his words will bear, and there will be not merely one difficulty less, but none at all. And if any cases have, through mistake of that authority, encroached upon the ancient common law, let them too go for nothing. The reason given in old books why courts of justice have refused to quash indictments for conspiracy, helps out our argument materially, and makes against our adversaries: that is, the "enormity of the offense," which is compared by the old authors to the corrupt forswearing of jurors. And this being universally extended to all conspiracies, what can more strongly show that by the ancient common law, none were indicted for conspiracy, but those who had been guilty of some enormous falsehood and corruption. The penal code in England, has, from time to time, become more penal, and is more sanguinary at this day than any in the world: ours is tempered by a milder scale, and it is all the better, as is proved by this, that fewer crimes of deep atrocity are committed here, than in England. If English statutes have made conspiracies of innocent acts, must we therefore, who have no statutes of the kind, proceed as if we had? If English judges extend the spirit of those statutes to cases not within them, must our judges stoop from their dignity to follow them? What shows that in the highest of all offenses indictments may be quashed, is, that before the statute of William and Mary, they were quashed for such

slight exceptions as misreciting, misspelling or bad latin, even in high treason: and since that statute, they may be quashed, provided the exception be well and timely taken in the court where the trial is to be, and before any evidence be given on the indictment.

One of the counsel cited a case from Blackstone's Reports, to show that the facts of conspiracy might be collected from collateral circumstances. That I take to relate to the question of proof, but to have no relation to the sufficiency of the indictment, upon which the court are to decide, and that upon the face of it.

Mr. Riker cited Hume's History of England, touching conquered and ceded countries; it does not in any shape affect or alter the view we have already taken of the subject, being the same doctrine we ourselves adopt.

The argument from the assembly journals, that courts of justice were appointed in the colony, with the same powers as those in England, may be answered by the arguments I have referred to, touching the appointment of an exchequer. The same counsel argued, that, by our constitution, the common law was all adopted, except what was expressly, and I understood him to mean particularly, excepted. I think the exception much more general, for all that is repugnant to the constitution then established on the broadest basis of equal rights, was excepted; and equal rights there cannot be, if these men can be prosecuted by a combination of their employers, merely because they meet and determine not to work with them for the wages they are pleased to give. And we have heard of no case of conspiracy at common law, where the combination was merely not to do what no law made it obligatory to do—most certainly there can be none.

The numerous references of the learned gentlemen, mean no more than what a merchant does when he draws his bills per duplicata, triplicata, quadruplicata, and so on, they being all referable to one single case, and that, in point of credit, no better than a blank endorsement. What is it all but pouring from vial into vial, unless it be that they have shaken

the bottle and raised up all the dregs that had precipitated to the bottom.

The District Attorney-General, has vouched the Emperor Zeno; he might as well have called upon all the twelve Cæsars, with their diadems upon their heads, for anything we have to do with either king or Kaiser. He says we have lived so happily under the common law, that we ought never to depart from it. He argues from the declaration of independence, that the people's chief complaint was, that they had been deprived of the best benefits and blessings of the common law! To be deprived of the law's benefits might be a very just complaint, and yet that law might need a great reform. The revolution which changed the entire form of government, from monarchy, the soul of common law, to a republic, which was a stranger to it, shows the sense of the whole nation upon that head, more strongly than words can. There are, besides, set forms and modes of speech which habit sanctions and which suit themselves to times and circumstances, but which are never taken at the letter. In England, in Scotland, and in Ireland, I have often heard such phrases, which meant nothing. I have heard men talk of restoring the constitution to its original purity, but no man ever fixed the epoch of that purity. All these are words of form and custom. The Cock-lane ghost gives us no apprehensions; we admit, the ghost could never kill nor put in jeopardy the living man; but then there was a false conspiracy, falsely to impute the crime of murder, by making it believed that the ghost of the deceased haunted the murderer's house. That was an overt act of false conspiracy to charge or to impute to an innocent man the heinous crime of murder. There was there that tinge of falsehood, fraud, and malice, without which by the common law there could be no indictable conspiracy. The *King v. Eccles*⁶¹ was cited to show that overt acts need not be set out, because the conspiracy is the gist of the indictment, and the means are but the evidence, which need not be set out. I answer, that being a statutable offense, the descrip-

⁶¹ C. C. Ass., p. 123.

tion is technical, and if it be brought by averments within the statutory description it is sufficient. The other precedents in the same book touching conspiracies, not to work but at certain rates, or at the usual rates, are evidently referable to the statutes of laborers; and the very term usual rates comes from the first statutes, occasioned by the plague, when the laborers were limited to the wages "usual in the four last years." The instance of barratry relied on by the counsel, is stronger still for us, for there he says, that the overt acts are never set out. True, but I ask him for what reason are they not? Because the term being technical, "communis barrator," no other would suffice. By that alone, the offense can be described, and seeing that the cases of barrators and common scolds are laid down as exceptions, they prove the rule, that in all other cases the overt acts must be set out, both that the court may see what the offense is, or whether it be any, and that the party may know for what he is to answer, and be prepared to defend himself against it. Now, as common scolds and common barrators could not be punished for any particular act, but merely for their general disturbance, it would be idle to set out particulars when the offense is general. The defendants there have notice that their general character is put in issue, and if they can disprove the charge of being common scolds or common barrators, no more is requisite. Yet on trials for barratry, the learned counsel know that it is now the settled practice not to let the prosecutor go into the trial, without first giving the defendant a note of the particular matters which he intends to prove against him; for otherwise, it is justly said, it would be impossible to prepare a defense against so general and uncertain a charge, which may be proved by such a multiplicity of different instances of which the indictment furnishes no notice. This substantiates the objection of my learned colleague, that the precedents cited against us, particularly in 4 Wentworth, although of a technical and statutable offense, do minutely set out the overt act, and describe the offense with great certainty, although, perhaps, in that case scarcely necessary; but here,

where the indirect means ought to be undoubtedly specified, they are not. Those cited from the same volume are, undoubtedly, also offenses made by statute. That against the carriers can be nothing else, though it concludes, for the reasons given, at common law. This wonderful compilation of the learned Mr. Wentworth, with all its labyrinths of indexes and apologetic prefaces, in which the author seems to accuse the dullness of mankind, for not comprehending his methods and his meanings, and which has caused more nervous headaches, than tobacco or strong drink, is called a very high authority. Pile the ten volumes upon one and another, like "Pelion upon Ossa," it is breast high, but otherwise it is no higher than the sun after he sets and leaves the world in darkness. Call it deep, or call it dark, but never call it high. My learned friend has argued that the common law is always in abeyance, and that, whenever it chooses to make an excursion from England, and pay us a visitation, it is entitled to the honors of the sitting, and the rights of citizenship in *secula seculorum*; if so, it is like the sword of Damocles, hanging over our heads, and we had better reconcile ourselves to heaven betimes, for we can never say when it may fall upon us. He says Hawkins is never wrong; I have shown an instance where he and the great Lord Coke are in opposition. One must be in the wrong. I give the counsel his choice, *utrum lorum*? The case he has cited from East's Crown Law, is conclusive for us and not for him; particularly when taken with the contents of the whole chapter of which it makes a part. The title of that chapter is, "Forceible or fraudulent abduction, marriage or defilement." Now this classification alone shows the meaning of this intelligent and experienced writer: and the circumspection with which he travels over the ground where others have gone astray, is a fresh proof of his ability and his good sense. He shows how, in an indictment for a conspiracy to marry a pauper, Judge Buller held it essential that there should have been corrupt solicitations. In that case, too, there was such perversion of all principles of justice, law, religion, and mortality, that, if it did not entirely fall

within the definition of false conspiracy, it fell within the reason and principles. But how unlike is that to the case of men contending for their undisputed right of selling their labor for the best price they can. How can that be a false conspiracy? And if it be not a false conspiracy, it is no conspiracy at common law.

But the learned counsel denied my position, that nothing was held conspiracy by the common law, that was not *crimen falsi*, and he cited some cases to disprove, which, I think, prove it: for although they are among those modern cases, which have been more loosely decided than the ancient, and may not exactly and entirely fall under the definition of maintenance, or false conspiracy, or champerty, yet that they sound in fraud, deceit, and corruption is most undeniable, and in that differ utterly from the case in hand. They are perversions of justice and right, for corrupt and dishonest purposes. The present case has no tincture of fraud, deceit or corruption, whatsoever, nor is it tending to any act which any law or statute has made criminal. The case of Sir Francis Blake Delaval, was, as the counsel himself has stated, a confederacy to have Miss Cately assigned (she being then an apprentice) for the purposes of prostitution—a horrible perversion of morals, law, and religion. Does it follow, because such an offense was punished as conspiracy, that shoemakers who meet to demand wages for labor, and whose utmost malice goes no further than a determination not to work for those that undervalue their honest industry—is it possible to place my argument in a stronger light than by the opposition of these two cases?

The learned gentlemen cited *The King v. Cope*⁶² to the same effect, and to it I gave the same answer. The charge was that of hiring a person to put grease into the paste of the king's card maker, in order to spoil the cards, and impoverish, by such indirect or unlawful means, the manufacturer. Does this case show that I was wrong in saying that all conspiracies at common law must be infected with the *crimen falsi*? But

⁶² Strange, 144.

since our declaratory statute, I do not think either of these offenses could be indicted here as conspiracies; because it must be something very heinous to amount to a conspiracy, which, as our statute shows full clearly, differs from all other prosecutions in this, that the intention is punished, though the crime be no otherwise effected than by the mere determination to commit it. If, indeed, the acts were executed, I think they would be clearly indictable, even here, though bare conspiracy to do them would not, because we have a positive statute defining conspiracy, and they come not within it.

The counsel argued further from Hawkins, that for conspiracies to impoverish a certain set of lawful traders, an information would lie in England: and in an anonymous case, an information was granted against button makers for combining by covenants not to sell under a set rate, and Holt, C. J. said, "it is fit that confederacies by those of a trade to raise their rates should be suppressed." This is all answered by what we have already so often said; that in England there are statutes against such confederacies, which statutes fix the rates; and to combine, and that by sealed covenants against the positive and declared law of the land, was manifestly indictable. Being indictable, the Court of King's Bench take upon themselves to grant an information, a practice, however, that our constitution prohibits, so different is the genius of our laws. The case of the brewers is also relied on very principally by my learned friend, to support the meaning given (as we maintain erroneously) to the text of Hawkins. I answer, its juxtaposition alone, is an argument that it was for some reason considered by Hawkins, or those from whom he copied, as a false conspiracy, founded in oppression or corrupt maintenance of each other, through right and wrong. It is a case in which the judges seemed much perplexed, and by no means agreeing with, or among themselves; but Hawkins was then treating specifically, of false and malicious conspiracies against public justice, and therefore must have meant to class that case amongst them, as appears from the whole of the cases he cites, and their context. It is besides a case

so extraordinary and so anomalous, that I do not think it necessary to argue upon it one way or other.

I had the good fortune, in citing the work entitled "Bolton's Justice," to have the sanction of my learned friend, who certifies the merit of that book. He has himself relied upon it strongly. It certainly contains both principles and precedents of great antiquity, and curiosity. I quoted it for a purpose quite different from that of my friend. I will again recur to it, to show that much of what was there laid down and held good law, would now with us be shocking to humanity. I shall read one only of the many precedents of impeachments and convictions which this valuable treatise contains; it may serve as a sample of the whole. The English title given to this precedent, which itself appears to be a transcript of a record, and is in Latin, is thus:

"For bewitching a horse, whereby he wasted, and became worse." Then follows the record of judgment and execution.

The jurors, etc., upon their oaths present, that S. B. of C. in ———, at the said C. in the county of E. aforesaid, certain most wicked acts (called in English enchantments and charms) at C. aforesaid, in the county of E. aforesaid, maliciously and diabolically, upon and against a certain white horse, of the value of 4l. of the goods and chattels of a certain I. S. gentleman, of C. aforesaid, on the day aforesaid, and in the county aforesaid then being, did exercise and practice, by means of which the said horse of the said I. S. on the day aforesaid, at C. aforesaid, greatly worstened (*pejoratus est*) and wasted away, against the peace of our said lord the king, and against the statute in this case made and provided.

I have seen charming widows; I have heard of widows bewitched; I have heard it said of some that they were ugly enough to frighten a horse; I have read that a great musician of old times could set all the bears a dancing by the charms of his music; I have read of the duets of Damon and Alpheisibæus, that used to make the cows wonder, and put the lynxes to sleep, but those tales I took to be poetical fables. However, I find it now a matter of record, the truth of which no man must question, that a most wicked widow did, with her English charms and enchantments, so intral a proud, milk white

steed, of no less value than four pounds sterling, and being of the goods and chattels of a gentleman, in so diabolical a manner, that he pined and languished, and that she did this barbarous deed against the peace of her sovereign lord the king. I find, however, that this cruel widow did not go unpunished, for her sentence is recorded in a memorandum added in the margin in these words, "judgment, a year's imprisonment, and every quarter to stand six hours in the pillory!!!" (I read later of the consternation of the unfortunate woman, who in vain denied that she was a witch, until overcome by the awe of the grave judges, and the oaths of the jurors, she was forced to acknowledge her crime no longer deniable, and to suffer her sentence amidst the reprobations and imprecations of the enlightened community, who revered these laws with stupid adoration.)

Now, will this honorable and enlightened court for the first time, institute in this country, an unprecedented prosecution, in compliance with such a book of precedents; or, is it possible to look but with distrust upon precedents, drawn from such sources?

My learned antagonist has, in his zeal for his clients, cited McNally's *Justice of the Peace*, which is like the rest of all these compilations, a repetition of preceding ones. I should have great confidence in the work of an author so versed in the criminal law, as I know that gentleman to be; but I think my learned friend has cited the very worst part of his book, and that which does least credit to the author, and which is of all others the least congenial to the avowed sentiments of the counsel himself. From the passage he has read, it would appear, that the unhappy state of the Irish people was not so much owing to bad laws, oppressive institutions, and foreign government, as it is brought upon themselves by combinations of this nature. I confess I never expected to have had this question to discuss with my honorable friend. And without going further than the old tried authority he has cited, or even the modern one to which he has resorted, I could show him laws sufficient to account for calamity in any country,

and against which charity and reason must ever be in active conspiracy. In Bolton's Justice, besides indictments for various kinds of sorcilege practised upon man and beast, he may find indictments against men for not coming to the church which they did not acknowledge, and quitting the worship of their fathers. Others against householders for living after the manner of their own country, and not after the English manner. Another against a man for speaking his own vernacular language and not commonly using to speak the English language. Another for wearing Irish apparel, and many others, so grotesque, so piteous, and so intolerable, that it certainly was going a little far to impute the misfortunes of the people of that oppressed country, to the combinations of journeymen. And I think, the clients can never repay with sufficient gratitude, the zeal of the learned and honorable counsel that has carried him so far beyond himself. I think it, however, a duty to the fair and honest name of my friend, to make his apology; the more so, as I perceive he is not now present to explain for himself.

I have read of Cato the censor, to whom (for the best features of his character, his simply integrity and his successful eloquence) I may compare my friend, that he had two mantles. The one he put on when he went to the forum; that was for splendor and parade. When he retired to the bosom of his family, he slipped that off and covered himself with one more simple, which I shall call his mantle of peace. Then in the bosom of his family, he was again himself. No doubt he often did and said for the clients he protected, what no private interest could ever have urged him to say for himself. Such is the nature and office of an advocate. To show that this is true, I shall resort to no other proof than his own words. A work lately given to the public under the joint names of Emmett and MacNeven, concludes with this comparison between the respective conditions of this nation and that of his native country.

"The ordinary revenue alone of Ireland amounted, it appears, in the year ending the 5th of January, 1805, to 18,328,160 dollars

and 8 cents; which is considerably higher than the whole income of the general government of America, in the same period.

"The total receipts of the treasury of the United States were then 17,597,698 dollars and 46 cents; but of this sum, no more was expended for the support of the general government, than 13,598,309 dollars and 47 cents; the expense of all the state governments together is fully estimated at about 2,000,000 dollars more. Making in the entire 15,598,309 dollars and 47 cents.

"That is, a country enjoying greater general happiness and a more progressive prosperity than any other in the world, whose commercial shipping averages 900,000 tons, whose flag is seen on every sea, whose industry is as unbounded as the globe, whose inhabitants possess liberty, peace and self government, is not at this moment much more populous than Ireland, and pays little more for those manifold blessings than one-third of what it costs the Irish people to live subject to ignominy, disquietude, commercial restraints and political slavery. Such are the advantages on one side of having shaken off the British yoke, and such the wretchedness on the other of being under its control."⁶³

What the counsel has said then in the warmth of his argument, was spoken by Cato, the advocate of his clients; what is written in this book, is written by Cato, the good citizen, the enemy of oppression, and the well tried patriot. Here spake the advocate, but there the man!

The same able advocate has admitted, if I may use the phrase, in commenting upon Hawkins, that in the cases of common barrators, conspirators, etc., the law has been overruled and again overruled. I say then let it now stand as it should in cases of conspiracy. Let us abide by our own statutory definition, which has been enacted with a full retrospective view of all the fluctuations of the English law, and has carried it back to its original ground, as declared by the statute of Edward III.

Touching the setting forth the overt acts, the counsel argued, that the exceptions in cases of treason, made by the statute to protect the subject against the abuse of power, are arguments, that, at common law, the overt acts were not required to be set out. I might readily admit all that, and our argument be in no wise shaken by it. I might admit, and, to be plain, I do admit, that a conspiracy to commit murder

⁶³ Pieces of Irish History, p. 302.

or treason, by any means whatsoever, is a guilty conspiracy, because, however much the humanity of the law will intend in favor of innocence, it cannot intend that men who combine to take away life, to betray their country, to rob, to accuse falsely, to defraud or extort, can be any other than wicked malicious and false conspirators. But before men can be judged false conspirators for refusing to work till they are requitted, some overt acts should be shown sufficiently strong to afford the inference of so heinous a crime as conspiracy, which is punishable with infamy. For the very passage relied on in Hawkins, shows the conspiracy he treats of to be punishable with pillory and branding. Before such criminality shall be intended, the overt acts which constitute that crime should be made appear, as well to the jury and court, who are to pronounce and judge, as to the parties who are to answer, and who require full notice in order that they may know against what they are to prepare their defense. Is there anything more monstrous than to call upon men to show that they did not use indirect means, and yet not tell them till the moment of trial, perhaps till their accusation is concluded and they called upon to answer, what those indirect means were? Where shall men then find witnesses or proofs? Is it supposable that the whole community is present at all times in court and ready to answer for everybody accused? If the indirect means are the crime, they must not only be proved, but alleged. If they be alleged but not proved, the indictment fails; and as they cannot be proved unless they are first alleged, so it is a nullity if they be not alleged, for every proceeding must be *secundum allegata et probata*, and proof without allegation, is no better than allegation without proof. In either case the proceeding is a nullity. And where no criminal matter is alleged, the court will then in justice quash the indictment, and not waste its time, which is the time of the public, nor oppress the parties, which is an oppression of the public, by forcing upon them the expense and vexation of a trial, which can evidently have no other fruit than oppression and vexation.

Suppose, says the counsel, the conspiracy was to effect the object by indirect means, and no particular means agreed upon, would not the court intend, that indirect means generally must be unlawful means? This is answered by what I argued in opening, where I showed that indirect is nothing else in law phrase than unlawful; that is, indirectum. But is it enough to put a man to answer on peril of fine, imprisonment, pillory, branding and infamy, or one, or all of them, to allege that he has used indirect means, and not tell him what means he is accused of using? As well might he be put upon his trial upon the idle formal allegation, that he was instigated by the devil, and had not the fear of God before his eyes, and driven to make out by evidence that he was not instigated by the devil, and that he had the fear of God before his eyes!

As to the case of *The King v. Linn*, which was a conspiracy to prevent the burial of the dead, it was an offense against religion, against civilization, against law. It was corrupt and a breach of the peace. Yet I do think, even that could hardly be punished, consistently with our statute, as a conspiracy, however, the acts when executed might be punished exemplarily in other forms; as riots, affrays, trespasses, breaches of the peace, etc., all of which are indictable per se when executed, but are not strictly of that complexion which would warrant an indictment merely for the intention, particularly under a criminal code milder by much than the English. Indeed the *Poulterers' case*, so much relied on, is conclusive for us upon that subject; for in the note at the conclusion of it, it particularizes with great care, those crimes which may be punished as conspiracies, although nothing be done further than the act of conspiracy. I shall once more repeat the express words. "Nota reader. These confederacies punishable by law, before executed ought to have four incidents: 1. It ought to be declared by some manner of prosecution; 2. It ought to be malicious, as for unjust revenge, etc.; 3. It ought to be false, against an innocent; 4. It ought to be out of court voluntarily." Now if the counsel who accuses

me of looking only straight forward, would follow my example and look straight forward himself, I think he would see before his eyes, in every authority he has quoted, enough to stop his course; but he chooses to turn his winkers before his eyes, and will see only sideways and obliquely. I wish he had given a direct answer, and shown how this indictment contains those "four incidents."

He cites a precedent of a proceeding against merchants, touching the rates of wool, and challenges us to show any statute on the subject prior to its date. I have answered him by laying open the index of Keble's statutes, which teems with such ordinances, and therefore, his conclusion that the conspiracy in that case was not by virtue of a statute, but at common law, falls to the ground.

The learned counsel derives from Hawkins three gradations of enormity in conspiracy, and which, he argues, are followed by corresponding punishment.

1st. Where the charge goes to the life; that is, where the conspiracy was by false accusation to take away the life of the victim, which he says is followed by the villanous judgment.

2d. Where there is fraud and deceit, there the punishment, if I understood him, is of an infamous nature, and subject to branding, pillory, etc.

3d. Where it wants these ingredients, then the punishment is fine and imprisonment.

To all this I answer, without binding myself to follow a definition which contradicts the declaratory statutes at once of England, and of our own state, that the third class must mean those conspiracies or combinations for wages which depend upon statutes that have not, nor never had, force here. And, therefore, as the present charge can, in this state, belong to none of his three classes, there is no need to reply to that classification. If the masters who prosecute here, be themselves indicted for conspiring to accuse, which is strictly an indictable conspiracy; or for conspiring to impoverish the workmen by preventing their selling their

labor; or for maintaining each other, right or wrong; or simply for conspiring to monopolize the labor of the poorer class; they may, perhaps, be punishable by the law they would enforce against us. But for the journeymen, they surely stand clear of every similar imputation; unless the court could make laws which none but the legislature can do, and this enlightened and patriotic tribunal will never do what is beyond its province.

The precedent produced by Mr. Colden, shows all it was cited for, that in the only record to be found of the kind, no conviction took place, or no judgment was given. I think, therefore, we had better be contented with the laws under which this country has so long enjoyed all its justly boasted prosperity, unless offenses of this kind become enormous. Then let the legislature provide for them. When the great merchants engross the firing of the city, let that also be provided for, but let not industrious shoemakers be punished through the fear that Mr. Edgar, Mr. Lenox, Mr. Gracie, or Mr. Clason, or any of our men of wealth, may some day do an act which they never yet have done, and which I venture to say none of them ever will do.

If the butchers and bakers combine, the one not to kill, and the other not to bake; they, and not the community, will starve for that; for if we have a sheep, we will find somebody hardhearted enough to kill it; and if we have flour, we may have griddle cakes; and if the evil requires a law we shall have a legislature to provide one in due time. But I think it somewhat too provident to suppose everything that is possible, and use that possibility as an argument for an oppressive and unprecedented accusation. The case concerning Macklin, the player, was also quoted from the Crown Circuit Assistant, as an indictable offense not created by statute, and yet not tinctured with the *crimen falsi*. It was, however, a conspiracy to breed a riot in Covent Garden Theatre, in order to force a meritorious actor and servant of the public off the stage, to deprive him, by such wicked conspiracy, of his bread, and was in the nature of that branch called maintenance, be-

ing a conspiracy amongst a number to maintain each other in a quarrel, and in what they all knew to be wrong. It was malicious and oppressive, and not for any concern of their own, nor in furtherance of any just interest or claim by any legal means, and if it was not strictly a conspiracy at common law, it was as like it, as it is unlike to our case.

But once for all, I refer again to the statute of New York, and intrench myself within it, and also to the evidence which negative usage furnishes, that this combination not to work, which is a mere nonfeasance, and omission of what no law obliged us to do, is not indictable within this state at common law. That it is not by statute it is admitted; and otherwise than by statute or at common law, it cannot be.

MR. COLDEN IN REPLY.

July 14.

Mr. Colden. Admitting all the cases cited against the defendant from the English books to be of full authority, none of them would warrant a conviction. The moment it was admitted that the object of the conspiracy was not criminal, there ought to be an end of the prosecution. And the doctrine and argument touching a conspiracy, to do a lawful act by unlawful means, seemed a distinction without a difference, an unnecessary refinement, and at best a begging of the question. To conspire to use unlawful means, was to conspire to do an unlawful thing, and was an unlawful conspiracy. All that is admitted freely. But when that was admitted, the question, whether there had been such a conspiracy, was not a whit advanced as to the constitution of the society, all the words of coercion with which it abounded, all the terms of arbitrary command, which might furnish such fertile subjects for declamation, were innocent and harmless, and would be so considered by candid judgment, when the undeniable truth was taken into account, that the only compulsion they used was a refusal to work with those whom they considered as joining in oppression against them. There was a well received and settled definition of crimes, by which they were divided

into two comprehensive classes, those called *mala in se*, which were crimes against the universal laws of God and nature, and those termed *mala prohibita*, or offenses against positive institutions. There must in this country be statutes enacted by the legislature, which speak the will and voice of the people. Beyond this definition there can be no crime, and it is impossible to draw the refusal of a body of men to labor under terms disadvantageous to themselves, or which they think disadvantageous to them, under each branch of this definition, without more subtlety than ought to be admitted in the law; and more straining than the genius of our code allows to be used against defendants in any criminal case.

MR. GRIFFIN, FOR THE PROSECUTION.

Mr. Griffin applied himself in answer to the observations of Mr. Sampson, upon the common law; and instead of judging it by the sharp rules of criticism, desired that it might be fairly and candidly judged by its effects. He drew a comparative view of the English people, and the English peasantry, with that of the people of the continent of Europe; of the independence of the one, and the debased and servile condition of the other. Admitting that the national code was the source of national improvement, manners, and civilisation, as was argued by Mr. Sampson, what better eulogium could be passed upon the common law of England than the flourishing and happy situation of the nation where that code prevailed; if the people of England with all their grievances are so much above the servile state of boors or the debased and benighted condition of those of Spain and Portugal, and other countries where the sword and the inquisition govern without control of law, it must be, even from the argument of his opponent, that the national code is more exalted and more beneficial.

Why is it, that "slaves cannot breathe in England?" Why is it, that "they touch that country and their shackles fall?" It is the common law which strikes off their fetters, it is the common law which expands them into freemen.

If England, in the times of general disorder throughout

Europe, escaped almost singly from the devastations of civil war, revolution and invasion, it was owing to the love of the laws that animated the people to contend, heart and hand, for their precious birthright, and to the genius of their constitution that watched over their destiny. What else had protected the English people from guillotine, bastille and inquisition? What else had implanted in the United States the principles of freedom which had grown up and matured, and finished in their perfect independence? Why was their condition even as colonies, so much above that of Brazil or Mexico, countries towards which nature had been perhaps more lavish of her favors? It was the principles of the common law which our ancestors brought with them, which first prompted them to assert their independence, and then in the days of trial and strife, moderated the fury of revolution, and served as sure and solid foundations of future security. It was in that free and hallowed volume which served as their palladium, and in which they found written the first lessons of their independence. It was the mild spirit of the common law that tempered the evils of civil convulsion and calmed the agitated waves, and finally shone forth with renovated lustre when those storms had passed away, that common law, the great magazine which supplied our state and national constitutions with abundant and useful materials for their solid structure.

Mr. Griffin admitted that there had been no personal violence, no outrage or disorder, but asked if the coercive measures of the society were less cruel or oppressive for that reason. He remarked upon the imperious and tyrannical edicts of the constitution and by-laws of the society, and asked whether it was possible for any workman to enjoy, without molestation, the indisputable rights of peace, neutrality, and self-government, in his own private and particular concerns. A journeyman was neither free to refuse entering into the society, nor at liberty, having done so, to leave it, without incurring ruin or unmerited disgrace; and to the real impoverishment which he must undergo, and to the evils heaped upon all who befriend him—to all this was added, the opprobrious

epithet of *scab*. If an individual master refused obedience to their laws, or fell under the displeasure of the society, a stroke was directed against him. And, though this stroke was not a corporeal wound, it was cruel and ruinous infliction, from which he could have no relief, unless the law provides one. He was proscribed without remorse, and outlawed without mercy.

If the master workman in general happened to offend this society, a general cessation of labor amongst the members of their own body was decreed, to which obedience was rigorously enforced; however much the necessities of their families might require their work, idleness was enjoined by them. They were commanded to do no manner of work; but it was a Sabbath not of rest, but of vengeance, of desolation, and of suffering. He did not complain of the defendants for forming themselves into a society, but for compelling others to become members. He did not accuse them of having advanced the price of their own labor, but of conspiring to regulate, by means of rigor and coercion, the wages and the will of others; his charge against them was not that they chose and determined for what employers they would or would not work, but that they had exercised an aristocratic and tyrannical control over third persons, to whom they left neither free will nor choice; and that they employed, to effect this purpose, means of interference in their concerns to which it was impossible for the sufferers to oppose any resistance.

MR. EMMETT, FOR THE PROSECUTION. ¹

Mr. Emmett declared that it was not his intention to advert on this occasion to a single law case, nor to open one of the numerous authorities that lay upon the table, because he had

¹ Before he began *Mr. Sampson* cited a passage from Reeves' History of the Common Law, to show that besides the ordinances to which he had adverted, all to be found in Keble's Statutes, there was a special jurisdiction and particular laws touching the staple of wool, and that the charge of conspiracy against the merchants in the reign of Edward III. might have very possibly been for an infringement of that code, which was called the law of the staple. So that there were two ways of accounting for it, viz.: by the

observed with what pain the jury had endeavored to listen to the elaborate arguments of his learned adversaries, whenever they turned upon abstruse deductions from the antiquities of the law. He neither blamed the counsel nor the jury in this respect; both had tried to do their duty, and he could not withhold his admiration of the research and ingenuity of his friend, who had shown such force of learning and industry. But it was plain that it was but labor in vain, for it never could be expected from the most intelligent jurors that ever were empaneled, that they should, in the incidental discharge of a duty for which they had no previous course of preparation, following the ablest and clearest logician through a range of argument which it must have cost a practiced and educated lawyer so much time and trouble to compose. It was what never was required of any jury; and it was not within their province, nor were they the worse jurors for not being deep read lawyers. The constitution had appointed two distinct offices: Judges had to determine questions of law, and jurors to decide upon questions of fact; and although the jury in criminal cases had the undoubted power, when they chose to exert it, of deciding upon law and fact, yet that was a right or power which a discreet jury would never assert but in cases where the strongest exigencies required them to do so. There were indeed occasions, when important public principles were in jeopardy, when it might be used as a saving and salutary privilege; but nothing less than such occasions would warrant

general statutes, or by these particular regulations, in neither of which it could be an argument that such conspiracies were by the common law. *Mr. Sampson* said he would go no higher into antiquity. If his learned friend chose to do so, he might now mount up Jacob's ladder, of which one end was in this world and the other in the world above. *Mr. Sampson* also cited a certified opinion of Judge Scott of Maryland, MS. where two cases were adjudged, one, where, after conviction, a new trial was refused; and another, when on demurrer to evidence judgment was for the defendant; on this distinction, that where the party said to be injured went voluntarily into the society, there was no injury done him, however it might be if he was compelled. This, he said, was applicable to the cases of Benjamin and Whittess, both of whom had entered voluntarily.

a jury to pronounce upon what no understanding, by the simple force of common sense, could be equal to. The certainty of the criminal law is as important as that of the civil, and that can only be preserved by leaving it to be expounded by judges, to whom education and habit have rendered it familiar, and who join knowledge of its theory to the aptitude which practice gives. Discreet jurors know that no science is intuitive, and that law, which comprehends the rules of all men's actions, can never from its nature be so simple as that some difficulties must not at times arise in the exposition of it. When they do, it is impossible to lay down the rule, but from a knowledge of what has been established by usage or by statute, and to do so safely, a knowledge of causes and consequences, which practice only gives, is essential. As well might a lawyer think himself qualified without any previous education, to be a merchant, a farmer, or an artist, as any of those to be a lawyer. And this plainly appeared to me in the course of the summing up on the other side. Where it turned upon the facts in evidence, I saw the jury giving an attentive ear; where it was general reasoning, I could mark them listening with patience; where it was humor and fancy, I saw the pleasure they received, and I joined in it, for wit and vivacity will always captivate and please; but when that labored chain of induction which did credit to the industry and reasoning powers of my learned friend was offered to the jury-box, I could discern in their individual countenances the truth of that sentence which says, "to questions of law jurors are not to answer."

One observation, however, touching the strictures passed upon the absurd antiquities of the common law; and I am far from denying the barbarity of its origin, and that it originated in dark and ignorant times. It is this: that its course has been marked with progressive improvement, which alone is eulogium and security enough. *Mr. Emmett* then passed to the constitution of the society, and dwelt with his usual force on several of its provisions, which he represented as arbitrary and tyrannical, and going to erect an imperium in imperio,

and overbear the rights of the citizen and the law of the land.

He took advantage of the hardship of Briton's case, and drew a lively and pathetic picture of the sufferings of an in-offensive old man, and of the cruelty of exacting from his employer the hard sacrifice of his abandonment, at the peril of his own destruction. He said he was not the advocate of any oppression, and if the masters had combined for any purpose of oppression, or in any shape against law, he would wish as much as any man that they should be indicted and convicted.

THE CHARGE OF THE COURT.

MAYOR RADCLIFF: There were two points of view in which the offense of a conspiracy might be considered; the one where there existed a combination to do an act, unlawful in itself, to the prejudice of other persons; the other where the act done, or the object of it, was not unlawful, but *unlawful means* were used to accomplish it. As to the first there could be no doubt that a combination to do an unlawful act was a conspiracy. The second depended on the common principle, that the goodness of the end would not justify *improper means* to obtain it. If, therefore, in the present case, the defendants had confederated either to do an unlawful act, to the injury of the others, or to make use of unlawful means to obtain their ends, they would be liable to the charge of a conspiracy. The court did not mean to say, nor did the facts in the case require them to decide, whether an agreement not to work, except for certain wages, would amount to this offense, without any unlawful means taken to enforce it.

Much has been said as to the application of the common law of England to the case. The absurdities of the ancient common law, and also of the statute law of England, had been exhibited in the strongest light. It is well known, that many of the ancient rules of the common law on this and other subject had been exploded or become obsolete, and that little of the mass of absurdities complained of by the defendant's counsel, remained in force, even in England. In this state the

court could not be at a loss in deciding how far the common law of England was applicable. Our immediate ancestors claimed it as their birthright. They considered it as securing to them many of their highest privileges, and they often appealed to that law in support of their rights, and against the arbitrary extension of power by the British parliament. The constitution of this state had also expressly adopted it, and declared, that such parts of the common law of England, and the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of said colony on the 19th of April, 1775, and not repugnant to the constitution, should be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall from time to time make concerning the same, etc. No alterations having been made by our constitution or laws, the common law of England, as it existed at the period last mentioned, must be deemed to be applicable, and by that law the principles already stated appeared to be well established. No precedents, it was true, of convictions or judgments upon them had been produced from our own courts, but no strong inference could be drawn from that, as until lately such precedents had not been preserved, and no printed reports of adjudged cases had been published.

The injury produced by unlawful combinations might affect any person or number of persons, as in the present case the master workmen, or the fellow journeymen of the defendants, or any other individuals. It appeared in evidence, that the society of journeymen, of which the defendants were members, had established a constitution, or certain rules for its government, to which the defendants had assented, and which they had endeavored to enforce. These rules were made to operate on all the members of the society, on others of their trade who were not members, and through them on the master workmen, and all were coerced to submit, or else the members of the society, which comprehend the best workmen in the city, were to stop the work of their employers. One of the regulations even required that every person of their trade, whom

they thought worthy of notice, should become a member of the society, and of course become subject to its rules, and in case of neglect or refusal, it imposed fines on the person guilty of disobedience. When the society determined on any measure, it found no difficulty in carrying it into execution. If its ordinary functions failed, it enforced obedience by decreeing what was called a *strike* against a particular shop that had transgressed, or a general turn out against all the shops in the city, terms which had been explained by the witnesses, and were sufficiently understood. These steps were generally decisive, and compelled submission in all concerned.

Whatever might be the motives of the defendants, or their object, the means thus employed were arbitrary and unlawful, and their having been directed against several individuals in the present case, it was brought, in the opinion of the court, within one of the descriptions of the offense which has been given.

THE VERDICT AND JUDGMENT.

The *jury* retired, and shortly after returned a verdict of guilty against the defendants.

THE MAYOR: The novelty of the case, and the general conduct of their body composed of members useful in the community, inclined the court to believe that the defendants had erred from a mistake of the law, and from supposing that they had rights upon which to found their proceedings. That they had equal rights with all other members of the community was undoubted, and they also had the right to meet and regulate their concerns, and to ask for wages, and to work or refuse; but the means they used were of a nature too arbitrary and coercive, and which went to deprive their fellow citizens of rights as precious as any they contended for. The present object of the court was rather to admonish than to punish; but an adjudication upon the subject being now solemnly had, it recommended to them so to alter and modify their rules and their conduct, as not to incur in future the penalties of the law.

They were fined each one dollar, with the costs.

THE TRIAL OF HUGH M. BROOKS (ALIAS MAXWELL) FOR THE MURDER OF CHARLES A. PRELLER, ST. LOUIS, MISSOURI, 1886.

THE NARRATIVE.

On board the steamship *Cephalonia*, which sailed from Liverpool for Boston in January, 1885, were two young Englishmen, one named Charles A. Preller and the other registered as Walter Lennox-Maxwell, M.D., but whose real name was Brooks. He was not a physician but had been a solicitor in England and was leaving home, evidently for his country's good. Preller was a commercial traveler intending to make sales for his employers in America. They were strangers to each other, but by the time they reached Boston had become intimate companions. They went to the same hotel where they discussed a trip to New Zealand, and as Preller had to make a business trip to Canada, they agreed to meet in St. Louis later. Brooks tried to get employment in Boston but failing he left for the West, arriving at the Southern Hotel, St. Louis, on March 31st.

He had been a guest at the hotel for several days prior to the arrival of Preller and was apparently pressed for money, having endeavored to pawn his watch and sundry trinkets and to sell some stereoptican apparatus. Preller had an unusually large amount of baggage and seemed anxious to prosecute his journey westward without delay. On several occasions he displayed a considerable sum of money, made many purchases and gave indications of being well provided with funds. After Preller's arrival at the hotel he and Brooks were inseparable, spending much time in Brooks' room and in the billiard room. Preller was rather reserved, but Brooks was affable and very talkative.

Preller was last seen alive in Brooks' room shortly after dinner on Easter Sunday, April 5. That night Brooks showed

the effects of excessive drinking and talked in an incoherent manner. In the dining room he displayed a pistol and a roll of \$100 bills and asked the waiter: "If a man committed murder in this country and had \$600 could he beat the case?" Next morning (Monday) he went to a barber shop and had his beard taken off, asking the barber: "Could any one recognize me now?" He told several persons at the hotel that his friend had gone to the country to visit acquaintances and would return in a few days. He made purchases of jewelry, wearing apparel, traveling equipage, etc., displayed large sums of money, paid his week's bill and without notice of departure took the night train for San Francisco, leaving in his room two trunks, one of which he had brought with him to the hotel and the other he had purchased and sent to the hotel on that day. On the train westward he assumed the name of D'Augnier, representing himself to be a French officer, and on arrival at San Francisco, after spending the night at a brothel, embarked on a steamship for Auckland, New Zealand, under the name of D'Augnier.

On April 14 an offensive odor in the room that had been occupied by Brooks led to its examination. The new trunk stood on top of the old one. The lower trunk was tightly corded and strapped so that it was opened with difficulty and was found to contain the dead body of Preller partly decomposed and very much cramped and distorted. It was naked with the exception of a pair of drawers, having the name of H. M. Brooks on the waistband. The moustache had been clipped off with scissors, and two gashes, skin deep, were upon the breast in the form of a cross. On the inside of the trunk was a paper bearing the inscription "So perish all traitors to the great cause" in the handwriting of Brooks.

An examination of the viscera disclosed the presence of sufficient chloroform to destroy life. Brooks had purchased a quantity of the drug at a druggist's near the Southern Hotel on Sunday, April 5th, and an empty vial bearing the store label was found in the room together with several other vials containing subtle poisons and dangerous drugs.

Great publicity was given to the case by the press of the country and the murderer was quickly traced to San Francisco and to New Zealand. The Auckland officials were notified by cable and Brooks was apprehended as the ship came into the harbor. He had in his possession about \$125 and some jewelry and wearing apparel marked C. A. P. He stated that his name was D'Auguier, that he had never borne the name of Maxwell, although articles marked W. H. Lennox-Maxwell were found in his trunk. He also stated that he had never been in St. Louis, but a diary found in his pocket contained a memorandum that he arrived in St. Louis March 31, 1885, and left that place April 6.

Tried for the murder of Preller the evidence of his identity was overwhelming. But the St. Louis authorities had resorted to an unusual scheme to obtain a confession of the crime. A detective named McCullough was ordered to "forge" a name to a check. A prosecution was then instituted; witnesses who honestly believed the name was signed, with intent to commit forgery testified before the grand jury and that body knowing nothing of the prearrangement indicted McCullough, who had for the occasion assumed the name of "Dingfelder." He was placed in Brooks' cell where he remained forty-seven days. On the trial he testified to this effect:

"I represented that I was friendly with the people who would testify falsely to help me out of trouble, and Brooks said: 'I wish I could get witnesses to do that for me, I might go free also.' I told him I expected to get out on bail, and when I did I would help him but I must know what he wanted the witnesses to testify to and also the circumstances of the case. He said that he wanted to prove that he had one hundred dollar bills while he was in Boston, as the prosecution claimed he had exhibited money only after the death of Preller. He then told me that he became enraged at Preller on the day he arrived in St. Louis because he refused to pay his (Maxwell's) passage to Auckland, and he decided to get even with him; that on Sunday Preller complained of a pain in the side. He told him he could fix that, so he injected a large amount of morphine into his arm, rendering him unconscious. He then tied a cloth about his face and kept it saturated with chloroform until he was dead. He then stripped the body and placed it in the trunk. I told him I expected to be released in a few days, and when I sent the witnesses

to him there would have to be some means of identification. He then wrote 'Dingfelder 2W' on a card, the '2W' meaning two witnesses. This card was torn in half, the defendant taking one half and I the other. It was agreed I would give my piece of the card to the witnesses and when they called they would produce this card, and if it matched the piece he had he would feel safe in talking to them. I was released on bond shortly after this and went to New York from where I wrote the prisoner regarding the witnesses and received an answer."

Upon cross-examination the detective said that he believed he was justified in such deceptions if done for the purpose of ascertaining the truth.

The prisoner testified in his own behalf that on Sunday afternoon, April 5, 1885, in his room at the Southern Hotel, at Preller's request, he attempted to insert in the latter's urethra, a catheter for stricture and that with Preller's consent, for the purpose of the operation, he administered chloroform with fatal results; that alarmed with the probable consequences to himself, not knowing that on a trial for the homicide he would be permitted to testify in his own behalf, supposing the law here to be the same as in England in that respect, he stripped Preller's body, placed it in the trunk, and after taking steps to evade the authorities, and prevent his identification and after taking all Preller's money, he fled in the hope of escaping arrest and trial; that his subsequent conduct was due to liquor and mental distress. This and the deposition of a number of acquaintances in England to show his good character and reputation, were all that the defense produced to offset the strong case made by the State. In rebuttal the prosecution showed that an exhumation of Preller's body had been made by three physicians, who, after an examination of the organ referred to, unanimously agreed that it was in good condition and that there had never been any occasion for the treatment described by the prisoner.

On the night of June 4th the case was submitted to the jury and on the following morning a verdict of guilty was returned.

The prisoner appealed to the Supreme Court for a new trial, claiming among other things, that the trial judge erred

in permitting the introduction of the confession, as it was not voluntarily made, but was obtained by fraud and artifice. The Supreme Court held, that while artifice and deceit were resorted to in obtaining the confession, it did not render the person obtaining it incompetent to testify regarding it, but went only to his credibility.

The Governor declined to interfere and Brooks was hanged on August 10, 1888.

THE TRIAL.¹

In the Criminal Court of St. Louis, Missouri, May, 1886.

HON. GARRET S. VAN WAGONER,² Judge.

¹ *Bibliography.* "Record No. 4347. Supreme Court of Mo. State v. Hugh Mottram Brooks. St. Louis Crim. Court. Filed January 25, 1887. Henry Ewing, Clerk. By Rowan Ray, D. C."

* "Reports of the Supreme Court of Missouri. F. M. Brown, Reporter. Vol. 92. Columbia, Mo. E. W. Stephens, Publisher, 1888."

* "The Trunk Tragedy. A Complete History of the Murder of Preller and the Trial of Maxwell. Carefully compiled from the statements of the officers and testimony of witnesses in the great case; together with interesting and incidental details. By E. A. Noonan, Judge of the Court of Criminal Correction of St. Louis, Mo. The St. Louis News Company, Publishers. 1886."

The St. Louis *Republican*, May 19-June 6, 1886. Also the St. Louis *Globe-Democrat* and the St. Louis *Post-Dispatch* for the same period.

The murder caused an extraordinary sensation in St. Louis. The city newspapers of the evening of April 14 and the morning of April 15 contained at least half a page describing the finding of the body of Preller in the trunk at the Southern Hotel, illustrated with wood cuts of Preller, Maxwell, the room where the body was found. And for the next few days the papers were full of the account of Maxwell's flight to San Francisco and the coroner's inquest, which resulted in a finding that Preller's death was caused by chloroform administered by Maxwell. In the issues of June 16th are found accounts from New Zealand of the arrest of the murderer there, and on August 11th many columns are given to telegrams from San Francisco describing his arrival there in the custody of the St. Louis detectives. In succeeding issues are dispatches from places along the route of his journey from the coast to St. Louis and on August 17th the *Republican* gives seven columns, and the other newspapers almost as many to the arrival of the prisoner in the city the day before. Then follow in succeeding issues long interviews with him in the city jail and columns of dispatches from England describing

May 18.

On October 30, 1885, the grand jury returned an indictment for murder in the first degree of Charles Arthur Preller against Hugh Mottram Brooks, alias W. H. Maxwell, alias Walter H. Lennox-Maxwell, M.D., alias Theodore Cecil D'Auguier. It contained three counts, charging the crime to have been committed in the City of St. Louis on April 5, 1885, first, by chloroforming the deceased until unconscious and then choking and strangling him to death. Second, by chloroforming the deceased until unconscious and then suffocating and smothering him by enclosing him in a fastened trunk, and third, by some means unknown to the grand jury in the perpetration of a felony.

The *prisoner* having been previously arraigned and pleaded *not guilty*, the trial began today.

Ashley C. Clover,³ Circuit Attorney, and *Marshall F. McDonald*⁴ and *C. Orrick Bishop*,⁵ Assistant Circuit Attorneys, for the State; *John I. Martin*⁶ and *Philip W. Fauntleroy*⁷ for the prisoner.

his life there; his family connections; also much about his victim of the same character. For this view of the great interest the case excited at the time the editor is indebted to Mr. C. O. Bishop (an assistant prosecutor on the trial), whose scrap book containing a complete collection of the newspaper reports was placed at his service.

² VAN WAGONER, GARRET S. (1822-1891.) Born Paterson, N. J., entered Yale University and studied law with Gov. Pennington; admitted to Bar, 1844, and practiced law at Paterson for eight years, holding also the office of Master in Chancery; removed to St. Louis, 1852; member Missouri Legislature, 1866; Atty. Mo. Pac. R. R. and Nat. Bank State of Missouri; County Counselor, 1876; Judge St. Louis Criminal Court, 1882-1888. Died in St. Louis. See "Bench and Bar of Missouri Cities," 1884.

³ CLOVER, ASHLEY C. (1858-1911.) Born St. Louis; son of Judge Henry A. Clover of that city; grad. St. Louis Univ., A.B., 1877, A.M., 1879; studied law at St. Louis Law School and Univ. of Va.; City Atty., 1881; Circuit Atty., 1884-1892. See "Memorial Volume of the Diamond Jubilee of St. Louis University, 1904, 236."

⁴ McDONALD, MARSHALL FRANCIS. (1854-1898.) Born Council Bluffs, Ia.; grad. Coll. of Pharmacy, Chicago, 1873; afterwards became a miner and later a drug clerk in St. Louis, where he studied law and was admitted to bar, 1881; Asst. Circuit Atty., 1884.

The following *jurors* were selected and sworn: M. S. Barnett, book publisher; James G. Barry, clerk; Charles Beggs, railroad clerk; William A. Cahill, printer; John Cuolahan, insurance agent; W. F. Chamberlain, produce dealer; James Dozier, boarding house keeper; David Child, sign writer; L. E. Jacobs, salesman; J. F. Sears, carpenter; August Blumenthal, dry goods merchant, and J. H. Hendricks, clerk.

During their examination——

Mr. Fauntleroy. If the Court please, we learn that there are two men stationed at the door who refuse to admit any one who is not a juror or witness or officer or some one having business in the courtroom. We object to that. This is a public courtroom and the trial should be public and the public admitted.

The COURT. We gave no such order.

Mr. Fauntleroy. They are there by some one's order and the effect is the same.

The COURT. What do you wish to do?

Mr. Fauntleroy. We ask that they be removed and that the trial be public as the law provides.

The COURT. The order of the Court is that anybody who wishes to come into the courtroom may do so. I will make this order: that all persons be allowed to come here until all the seats are filled, reserving the right to the attorneys on both sides to bring within the bar such persons as the Court may permit and giving preference to the jurors who have been summoned to be seated in the front seats outside the bar.^a

^a See 9 Am. St. Tr. 340.

^b MARTIN, JOHN IRWIN. Born 1848, St. Louis; went into business until 1875, when he studied law and was admitted to bar; member Missouri Legislature, 1872-1876; Sergeant-at-Arms Democratic National Conventions, 1892-1904; Colonel Mo. Nat. Guard.

^c FAUNTLEROY, PHILIP WILLIAMS. Born Winchester, Va., 1852; educated at Shenandoah Valley Acad. and Univ. of Va.; removed to St. Louis, 1872; was admitted to bar and practiced law there until 1893, when he was ordained in the Episcopal Church. He is now Rector of the Church of the Holy Communion at Lake Mahopae, N. Y.

^d In affirming the conviction the Supreme Court said: "It is also objected that defendant did not have a public trial. This claim is based upon the fact that during the early stages of empanelling the jury two men were stationed on the afternoon of one day and the forenoon of the next day at the door of the courtroom, who refused to admit any one into the courtroom except jurors, witnesses or officers of the court, or those having business in court. It

Mr. Bishop in opening the case for the State read the indictment, outlined the facts which the prosecution would prove by its witnesses, stated what the functions of the jury were and what the law meant by a premeditated murder.

THE WITNESSES FOR THE STATE.

Merritt R. Noble. Am a Southern Hotel clerk; on 31st March, about 11 a. m., Dr. Walter H. Lennox-Maxwell arrived at the hotel; saw him write his name upon the hotel register. Shortly before his arrival I received a telegram, dated Rochester, N. Y., signed C. Arthur Preller, asking if Walter H. Lennox-Maxwell had arrived; told him about the telegram and that I had just sent a reply, but thought it had not yet been sent, and that I would recall it. He said, "Do please." Recalled the telegram and sent one stating that Maxwell had just arrived. Noticed Maxwell seemed to be very nervous, so I assigned him to room 144, to which he immediately retired. On the 3d April

C. Arthur Preller arrived at the hotel and was assigned to room 385, as shown by the hotel register. On Saturday morning, April 3d, Preller and Maxwell came up to the office and Preller called for the keys to rooms 385 and 144; saw them about the hotel for several days; last time I saw Maxwell was on 6th of April, between 6 and 7 in the evening, Monday. He asked for the key to 385, which was Preller's room, which I gave him. I thought nothing of his calling for the key to Preller's room, as I knew them to be friends. I don't remember seeing Preller after Sunday, 5th April, until I saw his dead body in the trunk taken from room 144 on 14th April. I saw the dead body in

appears that when this matter was brought to the attention of the Court, the Court stated that no order had been made stationing men at said door and announced that any one who wished to come into the courtroom could do so, and made an order that all persons be admitted until all the seats were filled. Had the Court either refused to make such an order, or if, after making it, had refused a request on the part of the defendant that the jurors who had been examined touching their qualifications while the men were stationed at the door, should be re-examined, this might have afforded some ground for the complaint made, but no such request was made. Publicity does not absolutely forbid all temporary shutting of doors or render incompetent a witness who cannot be heard by the largest audience or require a courtroom of dimensions adequate to the accommodation of all desirous of attending a notorious trial.

. . . And the requirement is fairly met if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those whose presence would be of no service to the accused and who would only be drawn thither by a prurient curiosity are excluded altogether." 92 Mo. Rep. 570.

the morgue and identified it as Preller.

L. E. Hunt. Am Southern Hotel cashier; Maxwell's first week's board was due April 6th and was paid by him on that day about 12. He did not indicate he was going to leave the hotel. Preller's board bill was not paid by Maxwell, and still remains unpaid. Maxwell is indebted to the hotel for one week's board, as he did not indicate, when paying the first week's bill, that he would give up the room.

Renick Brown. Work in the Southern Hotel billiard and pool room; Preller and Dr. Maxwell often played billiards or pool at my tables. Preller resembled a Jew, and I at first took him to be such, until I heard him talk, with a very strong English accent. Preller was very polite and kind to me, and had several conversations with him, but never talked with Maxwell. They came in two or three times each day and played for an hour or two each time. They drank considerable, the drinks always being ordered by Preller and paid for by him. Preller also paid for the billiards or pool. Preller displayed a good deal of money; on one occasion I saw him take out a large roll of bills; never saw Maxwell with any great amount of money. On Saturday, 4th April, Maxwell came to me in the billiard room and asked if his partner (meaning Preller) was there. I told him "no." Shortly afterward Preller came in and told me to hold the first vacant table for him and Maxwell. They played together for some time and then left;

do not remember of seeing Preller again after that until I saw his dead body in the trunk. I identified the dead body in the morgue as that of C. Arthur Preller.

Cross-examined. They were very thick; never heard them quarrel or saw them drunk.

Maggie Cuddy. Am chambermaid at the Southern Hotel; room 144 was on the floor where I worked. It was my duty to make up the bed in the room and see that it was kept cleanly; knew C. Arthur Preller; saw him frequently in Maxwell's room, and they appeared to be great friends; last time I saw Mr. Preller was in Maxwell's room on Easter Sunday about 1. Preller was leaning against the window, smoking. Maxwell was sitting at the table in the middle of the room. They appeared to be friendly; went to room 144 next morning about 9 to clean up. There was no one in the room at the time, but Maxwell came upstairs as though from breakfast, as I left. Shortly after saw him come out of the room with valise and hat box in his hand; when I first entered that room Monday morning, saw two trunks and two valises; one was a zinc trunk, quite large, and stood up against the wall. It had two leather straps around it and a rope; the other was a yellow colored wood trunk, on the top of which laid the two valises; had not seen two trunks in the room before that morning. When I saw the condition of the room and Maxwell leaving with the two valises, thought he was going away; went into the room again Monday afternoon, about

2; the baggage was still in the room; did not go to the room again until next Tuesday morning. The bed was slightly mussed, but did not appear as if any one had slept in it; visited the room again on Wednesday morning. The baggage was still there; the bed was undisturbed and the towels had not been used. From that time no one occupied the room until after the finding of the body in the trunk; did not see Maxwell again after the Monday morning I saw him leaving the room with his valises; he did not notice me and appeared to be much excited; noticed him particularly because usually he remained in his room until 10 or 11 o'clock in the morning, at which time Mr. Preller always called for him to go to breakfast; had never seen Maxwell up that early before. He rushed into the room in a great hurry, and seemed to be very much excited; always found Preller in the room No. 144 with Maxwell, except on the Monday morning. From the articles in Maxwell's room I supposed him to be a doctor. A few days after Maxwell ceased to use the room, noticed a strong stench in the room. Later on it became very strong, almost insufferable, and I then saw that it came from the zinc-covered trunk; called the attention of the officers of the hotel to it, and Tony Freitag, one of the porters, carried it from the room to the sidewalk. Saw the dead body in the morgue, and also the trunk from which it had been taken; identified the body as that of Mr. Preller, and the trunk as the same zinc trunk that I saw in

Maxwell's room and from which the stench came.

Cross-examined. Thought prisoner was a doctor because of the bottles and instruments and the smell of drugs in his room; the two were very friendly. Monday morning there was no appearance of a fight or struggle in the room.

John Lyons. Am night porter at the Southern; remember when Maxwell arrived; he came to me at the baggage room of the hotel about 8 o'clock and handed me four checks and showed me his baggage, and asked me to take it to room No. 144. The baggage consisted of a valise, a hat box, a portmanteau and one trunk. The trunk was zinc-covered and fastened with two straps and a rope; saw no sealing wax on the rope; the trunk in which was Preller's body was found. I identified the zinc trunk which I took to room No. 144, at Maxwell's request.

Kate Clark. Am chambermaid at the Southern. C. Arthur Preller had five large trunks and a hat box; saw him every day, as he generally got up about 9 o'clock every morning. He was scarcely ever in his room during the day; never saw anybody in the room with him; last time I saw Mr. Preller was Saturday before Easter Sunday as I passed the door in the morning. On Easter Monday about 10 o'clock I went up to clean the room; saw that the bed was not much disturbed.

Thomas Manion. Have been porter at the Southern for five years; took Mr. Preller's five pieces of baggage to his room when he arrived; saw him and

Mr. Maxwell together a good deal. Once the latter asked me if he could check trunks to San Francisco; helped to take the trunk with the body down stairs; on the sidewalk we opened it and saw the body. As soon as we raised the lid of the trunk the right leg kind of rose up; it was kind of forced in; it kind of got loose, and it sprung up kind of straightened; it startled me; I thought it was alive; I started back a bit and could not stand the stench and went inside. The head was stuck in under the cleat at the head of the trunk so it could not come loose. The toes were fast at the other cleat and the body was sticking down straight, with the arms in under both shoulders and his knees. We rang for a patrol wagon which came and took it away; saw the body at the morgue; it was Mr. Preller's.

William E. Warren. Live at Worcester, Mass.; met Mr. C. A. Preller and the prisoner on the Cunarder *Cephalonia* at Liverpool, January 21, 1885; we were fellow passengers; that is a picture of Mr. Preller. As there were only five first-class passengers we were thrown much together; we arrived at Boston February 3d; Preller told me that he met Maxwell on the steamer for the first time; told me he was an attorney; that he had studied medicine and chemistry and had recently walked in a hospital. He showed me some surgical instruments, also showed me a hypodermic syringe and a cigarette - making contrivance. Preller and Maxwell were very friendly. I looked at it as natural, both being English going

to America. They spoke about stereopticons. Mr. Preller was in the music room a great deal and Maxwell less than any one. I asked Maxwell to write to me; gave him my name and address, for he was coming to locate in a strange land, and my sympathies were interested in him; and as I left the ship I said: "Maxwell, when you get settled let me hear from you. I hope you'll get along well and settle here, where we'll see you." He said he was the last of his line; had neither father, mother, sister nor brother. He spoke to me about getting a place as surgeon at Auckland, saying he didn't want to be beholden to anybody. He asked me about lawyers, and I told him that there were lots of room at the top, but it was crowded at the bottom, and that lots of them were starving in their little offices. He asked me how hotel clerks were paid and how they got on, and I told him that he'd be of little use in a hotel in this country. He asked me how a salesman was paid, and I told him I didn't know. He changed a \$20 bill for me, saying that he had \$200 changed at Cook & Co., Ludgate Circus, London. Some time after we landed in March he wrote me from Boston, saying that he had failed to get anything and was going to New Zealand; asked me to meet him at the American House, which I did on March 24. He didn't seem to be settled as to what he would do; but what he did say was that he and Preller were going west on an emigrant train to San Francisco, and that Mr. Preller was going to use his influence with the officers of the

Pacific Mail steamship to get him a place as surgeon on one of the vessels. He said he was to meet Preller in St. Louis. Preller was, he said, in Montreal. He said he had been called into consultation by some doctors in Boston in important cases. He went into the winerom and had a bottle of claret. His eyes were bloodshot, his lips parched and swollen and presented the appearance of a debauchee. He drank the wine with avidity, as if it tasted good, like water sometimes does in the morning. Have not seen him since then until I saw him here April 7th. Wrote me from St. Louis saying "we are going to Texas and going on a ranch. I suppose it will be very pleasant for a time, but we may soon get tired of the affair and feel inclined to come to more civilized places. This place is not much of a place. I do not think \$5 has been spent on the streets for the last—I was going to say 100 years. They are awful. I thought Boston was bad enough, but it is not to be compared to this place. However, we live and learn, and must hope for the best."

Preller was about 5 feet 10 inches tall, with very soft and dark hair and heavy eyebrows. He had little whiskers under his ears and his complexion was of a very fair olive color. His voice was ordinarily soft, but not in any sense of the term effeminate; was very retiring and courteous; Maxwell was not at all retiring in his disposition.

James Tracy. Am detective on the police force; first met the defendant in the jailer's office at Auckland, New Zealand on the

29th June, 1885; was there as the agent of the State of Missouri to secure the extradition of Walter H. Lennox-Maxwell, and with me was officer Goerge W. Badger, of the Metropolitan Police Force. We left St. Louis 30th May, 1885; took possession of the prisoner on the 21st July, 1885; had the first conversation with him on the 29th June in the jailer's office at Auckland; showed him a photograph of himself; he neither recognized nor denied it. Property of his was turned over to me, consisting of two valises, a trunk and a hat box. He said the property was his. The revolver, the flute, the watch chain, the Hart & Duff hat, the diamond ring, the flask and cup, the spectacles, a smoking cap, jewelry, cuff buttons, two silver watches and a gold watch were found among the prisoner's effects. This testament I recognize, and also the name W. H. Lennox-Maxwell, M.D., and B. G. F. R. S., written on it. Also this book with the name T. C. D'Auguier on it, all found in his possession. I further found with him this forged diploma on the Royal College of Physicians and Surgeons, and this lead pencil draft of said forged diploma, and a tag with the word "Cephalonia" written on it; also field glasses and a letter in an alleged cipher, written in Maxwell's handwriting and addressed to the minister of war of France, and signed T. C. D'Auguier. I asked him about it, and he said it was written to a gentleman in Paris, and he thought he had mailed it in San Francisco. I asked him what the contents were and he refused

to enlighten me. I said: "Walter, I already know you by three names, now what is your name?" He told me that his true name was T. C. D'Auguier, born in "Paree," and shortly afterwards moved to Scotland, and was educated by a tutor who was traveling with his family. He said he was 35 years old and had practiced law in the Temple in London. He acknowledged the photograph of himself, and said it was taken ten years before, and the gown was that of a law student. He spoke in broken English, and always called "the" "ze." I asked him why he did not drop the French business, and he said he could not speak English without an accent. These cuffs and collars, marked C. A. P. were found in the prisoner's baggage. These handkerchiefs, marked in the same manner, were found with the cuffs. These towels I found. They are marked "The Southern, 1885," and were also in the baggage; these drawers were found just as they look now, turned inside out, and are marked C. A. P., and this undershirt I found in the same place; cut just in the same way it is now, and the white linen shirt and gray drawers marked C. A. P. These articles were wrapped in one of these towels, and in the center was a small pair of scissors. The drawers, towels, shirts, cuffs and collars were in one bundle. I showed Maxwell a photograph of Mr. Preller. He looked at it for some moments, and said he did not know the gentleman. He said he had a bad memory, and in six months would probably not know me or my picture. I

said "this is Mr. Preller's picture," and he said "I don't know him." Subsequently he told me he knew Preller in Liverpool before he sailed on the steamer Cephalonia, and had met in the East. He said he had last seen him in Boston; asked him how much money he (Maxwell) had when he started on his journey. He said he had about \$1,000; asked him how he spent it all. He said he spent quite a sum in St. Louis, another pile in San Francisco, some on board ship. I said, "Surely, you didn't spend it all?" He said, "I did, and you'll have to ask my counsel (Napier) where the last of it went. He got the last \$180 of the money. I asked him where he got it, and he said he had it. I asked him the denomination of the money. He said some large bills, some small bills and some gold. I talked with him about the field glasses and the diamond ring. He said he bought them in St. Louis, but did not know what street. When we arrived in San Francisco I turned him over to the municipal police, and did not see him again until the next day, when I took him away.

J. W. Fernow. Am a St. Louis druggist; the person calling himself Walter H. Lennox-Maxwell came to my store shortly after arriving in the city and told me he was stopping at the Southern Hotel; stated that he was a doctor and thought of practicing his profession here, and asked where would be a good location for an office. I told him to go out on Olive street; gave him some of my prescription blanks, and after that he called again

and purchased some small articles. The third or fourth time he called he bought some chloroform; was in my store as much as ten or twelve times altogether; on one of these occasions he told me his partner was coming and told me his name; he told me he was also a doctor. Saturday, April 4, he came to the store and said his partner had arrived. About 1 o'clock on Easter Sunday he stepped in and said, "Mr. Fernow, put me up four ounces of chloroform." I did, and gave it to him, and he got some absorbent cotton at the same time. About 5 the same evening, while I was very busy with prescriptions, Maxwell came in again and said to my boy, "Put me up some chloroform." I said, "Have a chair, I am busy just now." Maxwell said, "No, I am in a great hurry, you must attend to me first." I only had five ounces of chloroform left, and I gave him two ounces. He said, "Is that all you have?" I said, "I have only three ounces now and I cannot give it to you." He replied, "Give it to me." I said, "I cannot do it; I wouldn't be without chloroform in the house." He left without having the bottle wrapped up. I put a label on it, and he said, "What do you put that on for; I am a doctor and don't want it." He tore it off, threw it away and went off in a great hurry. I was at Hickman's barber shop getting shaved one day, when Mr. Armo, the barber, told me he was not feeling well, and that a doctor had been in there and given him a prescription, and stated that the doctor had told him to come to

my store to have it filled. He showed me the prescription, and asked me if I knew the doctor, and explained that he was an English doctor stopping at the Southern Hotel; saw that it was written on one of my prescription blanks and recognized it as having been written by Dr. Maxwell; have never seen Maxwell since his visit to my store at 5 o'clock the afternoon of Easter Sunday until today. On his visits to the store he bought a tooth brush at the first visit and other nick-nacks later on; some bromide of potassium and an ounce of chloroform.

Mr. Clover. Open that valise, Mr. Fernow, please, and tell us what are in the bottles therein contained.

Mr. Fernow (opening the valise) Jamaica ginger, that's aromatic spirits of ammonia. This is tincture of nux vomica, the active principle of which is strychnine. This is hyoseyamus. This is tincture of henbane. This is sulphuric ether; this powder, granulated iodide of potash. Here is fluid extract of ergot; a three-ounce vial of laudanum, fluid extract of hydrastis canadensis, known as "Golden Seal;" chloral hydrate solution, chloroform; Magende's solution (morphine) sulphate—two drachms; compound phosphorus pills, a hypodermic box with syringe, and morphine solution, tincture of cantharides, iodoform, morphine and atropia, collodion and nitric acid. Most of these are poisons. This is sulphate of morphine. None of those bottles are from my store. They have the label

of a druggist named McIntyre, in Boston.

Mr. Clover. Did he explain why he wanted more chloroform? He said, "I knocked over the other bottle just like a child." How many able-bodied men could you kill with what's in those bottles? About a dozen I should say. How many fatal doses are there in that bottle of laudanum? About four fatal doses—may be a little more. I will state, however, that persons may become so used to taking the drug that they might drink the whole bottle and it wouldn't hurt them. What is chloral hydrate? A narcotic to steady and quiet the nerves. It is used when bromide of potash won't do the work, though it is more dangerous than potash. Potash will not kill except in extraordinary doses.

Cross-examined. Am 23; have been in the drug business eight years; started as a bottle washer; attended St. Louis College of Pharmacy a year; heard lectures and studied at night; have had my drug store a year and nine months; think I have a fair memory, but can't remember all the times prisoner was in my store; he paid in cash for all he bought; am positive he told me his friend was a doctor, too; we did not talk about medicine, but about his travels;

George H. Rude. Am a clerk in the postoffice here; saw prisoner on night of Easter Sunday about 11 at a shooting gallery at Broadway and Chestnut; he was talking about his adventures in the Turkish army; said they called him two or three-tailed Pasha; that he received the title

for bravery; he had a big revolver; said he had it to protect himself as he sometimes carried \$2,000 with him; said he was going on a ranch; he spoke about Turkish women; when he went out he stumbled as if drunk; his hat came off; he picked it up, braced himself, and walked off.

Harry Allington. Am captain of the watch at the Southern; my office is to see that the boys and waiters do their duty to guests; April 2d prisoner told me he expected a friend that morning, Good Friday, at lunch. Mr. Preller came with him and I said to them, "Did you have any hot cross buns for breakfast" and Mr. Preller laughed and he says "You got hot cross buns here?" I says, "no, sir, we have not but I spoke to the hat man this morning and told him to ask you if you had any for breakfast" as it is the custom in England on Good Friday morning to have hot cross buns; the people peddle them on the streets—hot cross buns, three a penny.

Maxwell told me he was a house surgeon at Manchester, England. Mr. Preller did not talk much but Maxwell did; Saturday afternoon, shortly after they took dinner together, saw Preller playing the piano in the parlor; Maxwell was present. This was the last time I saw them together. Next (Sunday) night, Maxwell came into the dining-room alone a little after ten, with his hat and overcoat on. After ordering some cold beef and tongue, he asked for a wine card and ordered a small bottle of champagne. I noticed he wrote the order with a gold pencil which I thought was of an En-

glish make because I saw a crest on top, the crest being a lion with one paw raised. The wine was brought, but he drank very little, taking a mouthful only and telling the waiters to drink the remainder. He was more than half drunk; he acted silly. He told me he was a pasha in the Turkish army. He said, "My friend Preller has gone out into the country and he won't be back, and I am going to pay his bill; will his baggage be safe in his room?" I said, "Most certainly, it will be all right." I walked towards the door, when Maxwell called to me and said, "Say, suppose a man was to kill a man in this community, would it cost him over five or six hundred dollars to get off?" I replied, "My friend, you are in a civilized community," to which he made no reply. Noticed that he pulled out a large roll of money and laid it upon the table. He stood near the door and talked to me quite a while. He said, "I guess I will change my English wardrobe and put on a western attire," and at the same time pulled out a large revolver and said, "Ain't it a daisy?" I said, "Where are you going? What are you going to do?" and he said "We are traveling, me and my partner Preller, and we are thinking of going to Cape Coast, as I thought of trying to get a position as physician or surgeon on one of the mail steamers." He said, "You go out with me tonight, and we'll have a hell of a time—I don't mind spending fifty or sixty dollars;" I declined to go. Monday evening, 6 of April, saw him in the dining-room. I went over

and tapped him on the shoulder. He started and looked around at me, and I asked if we were going to have that good time tonight, and he said, "No, I have had a dispatch from Washington, and I am called back to Turkey." He then skinned out pretty quick and I saw nothing more of him. The dead body in the morgue I am satisfied was the body of C. Arthur Preller.

Cross-examined. Would say prisoner was three-quarters drunk that night; can't say whether the money he showed me was in the pocket book or in a roll.

Frederick Bieger. Am in the trunk business at No. 16 South Fifth Street, about half a block from the Southern Hotel. On 6th April, 1885, about 7 o'clock, a young man who said he was stopping at the Southern Hotel, came in my place to purchase two trunks; had a sandy beard and mustache. He said: "I want to take a lot of clothes out West, but I don't want anything expensive, but pretty fair." He selected one large packing trunk for which he paid me fifteen dollars and a half. He then said, "I want another." I took him back and showed him a canvas-covered trunk. He said he would take that trunk. I asked him if he wished the tray, as the trunk was not quite finished. He said no, he didn't want the tray; said send trunk to Southern Hotel, room 144. I sent the trunks right over; saw him again the same day, about 4. He wanted to know where he could get some shot and powder, and I directed him to C. & W. McLean on Broadway. In about an hour,

he came back with a package in his hand and said he wanted a couple of straps. I wrapped up two and he took them along. Saw him again in the evening in the store, when my brother sold him a canvas-covered valise. He said he would carry it along himself; that was the last I saw of him. When he paid for the trunks, noticed that he had a nice roll of money; saw ten, twenties, and a hundred dollar bill, and if I am not mistaken a two hundred dollar bill. I would take him to be an Englishman; asked him if he wanted his name put on the trunks; he said no; he was in a hurry to get the trunks to the hotel, and I promised to send them over in five minutes; have examined the trunk at Police Headquarters and identify it as one of the trunks that I sold and sent to room 144. At the time I sold it, it had no tray, but when I saw it at Police Headquarters it had a tray in it, but it was not the tray that belonged to that trunk. because the tray that belonged to that trunk we kept in the store; also discovered in the trunk a partition which was not in the trunk when we sold it. Neither the partition nor the tray fitted the trunk which I sold, but does fit the zinc trunk in which the dead body was found and which is now in the morgue.

Charles Bieger. Am in the trunk business with my brother. On Monday afternoon, the 6th of April, 1885, about half past 4 o'clock, a young man came into our store and wanted to purchase a valise. He had been there earlier in the day and bought two trunks of my brother.

Asked, "What kind of a valise is that?" I said, "They are made for sea purposes, and are waterproof." "That is just what I want," and he took it, paying me five dollars. He said he was going to the hotel and would carry it himself. Instead of going toward the hotel, he walked north, in the opposite direction. In about fifteen minutes I saw him pass with the valise in his hand. He had a soft hat of a dark color. Before he left with the valise he said he was going to leave that night, and was in a hurry, and seemed to be very much excited. On the morning of 14th April, 1885, was called to the Southern Hotel to open a trunk. The trunk was a large zinc trunk, and had stamped upon one end of it the initials W. H. L. M. I found the trunk on the sidewalk; trunk smelled very badly. There were two straps around it; tried to untie the rope with which the trunk was bound, with my hands, but I could not do so. It was knotted, and the ends of the rope were cut off quite close to the knot, and there was sealing wax on the rope on the top of the trunk; pulled out my knife and cut the rope in three or four different places, and commenced to open the lid, when I saw the leg of a man come up out of the trunk; then opened it fully and saw the dead body lying in a very cramped position; had to push the leg back in, in order to close the trunk. A wagon came and the trunk and its contents were taken to the morgue by the police. Am pretty positive, however, that they are the same straps the young man purchased

from us. Saw the zinc trunk at the morgue, and identify it as the same trunk that I was called upon to open, and in which the body was at the hotel.

Cross-examined. I thought prisoner was excited and in a hurry the way he swung his valise as he walked.

Robert H. Stith. Am hat man at the Southern; I take guests' hats when they go into the dining room and return them when they leave; Good Friday morning Mr. Maxwell told me he expected a friend that day on the train; saw them at dinner that night and on Easter Sunday; Monday evening saw Maxwell going out with a valise and overcoat on his arm; I said to him, "Hello, are you going to leave us," and he says, "No, I am just going out of the city to see some friends and going to spend the night out, and I will be back again; I have left all my baggage here," he says, and went on to tell me that he was a surgeon in the Turkish army, and he says, "This is my Turkish uniform I have here now; I am going to put it on when I go out and have a nice time."

How do I determine to whom the various hats belong that are left in my charge? How do I succeed in returning the hats? Well, if you give me your hat I generally look inside of it and compare the stamp of the hat with the party's face, and when he returns by looking at the face and the stamp I make the two correspond together. This is Mr. C.'s hat. If you hand it to me I look at your face and I look at the stamp and lay this hat down and as you are coming out I will

look at you, and as soon as I put my eye on the stamp in the hat my recollection comes to me and forms a likeness of the two. I suppose I have handled as many as 800 hats a meal.

Mr. Clover. Will you say again the *modus operandi* by which you are able, with hundreds of guests at a meal, to return each one his own hat? Well, it is the same idea; I take the picture of the hat and compare it with the resemblance of the face, as I told you, I look at the hat and its band and then at its owner's face and picture the face and the hat; I identified Mr. Preller at the morgue.

Cross-examined. The two were very intimate; they came to their meals and went to their rooms together. One of them asked me—am not certain which—where Father Bett's church was. Mr. Preller talked very little, most of the talking was by the prisoner.

Samuel R. Hughes. Am city ticket agent of the St. L. & San Francisco R. R.; sold through ticket to San Francisco to prisoner on April 16, about 10 a. m.; he and I both signed it; I recognize both signatures; it cost \$116; he gave me a hundred dollar bill and a twenty and I returned him \$4.00.

George J. Hess. Am of the firm of Hess & Culbertson, pawnbrokers, on Fourth street, opposite the Courthouse. A few days before April 6th, prisoner came in the store, said he wanted to borrow \$25.00 on a silver watch and chain which he showed me; he said he had paid five pounds for the chain in the old country, and I said if he did he

had been swindled; every other link was nickel-plated; told him I could not advance the money on the things; he replied that he must have \$25.00, and produced two gold and silver pencils and a pocket flask. Next Monday he came in and bought a flute for \$8.00, gave me a hundred dollar bill, which I sent out to have changed; while he was waiting he asked for a pocket case of surgical instruments; told him I had none for sale, then he bought a \$25.00 diamond ring. The flute here and the ring are the ones I sold him; said he expected more money and would buy a gold watch in a few days.

Albert S. Aloe. Am a dealer in optical and surgical instruments. Early in April two gentlemen came to the store; one said he wanted to sell a magic lantern outfit, that was the prisoner, and this photo (Preller's), is the party that was with him. They came in again a few days later, and Maxwell said the lantern had not yet arrived. Easter Monday he came in and my clerk brought me a hundred dollar bill and told me he had sold the gentleman of the lantern a pair of gold spectacles and a field glass; I gave him the change; that afternoon he came in again and bought some manœuvre scissors and file.

George Franklin Duff. Was a clerk in my brother's hat store, Hart & Duff Co.; Easter Monday, a year ago, prisoner came in; said he wanted to purchase a hat, and I asked what kind, and he said "One with a broad brim—something that would make him look like a Yankee."

I showed him several; they didn't seem to suit him until I got something with a pretty broad brim, and every time he tried a hat he asked me if he looked like a Yankee, and I informed him that he might look like one but his speech would not answer, and he fooled around for about twenty minutes; he seemed to be very nervous and excitable; finally I sold him a soft felt mouse color; recognize this as the hat I sold him; our private mark is on the band.

William H. Duff. Am in the hat business at 113 Broadway; saw prisoner at our store Easter Monday; he bought a soft hat; he said he was in the Turkish army; that his name was Tewfik; he left an English silk hat to be blocked and asked for a barber shop; said he did not like the Southern Hotel barbers; I directed him to Hickman's; he had a valise and a gray wrap on his arm; he never called or sent for the silk hat.

John T. Duff, a brother of the former witnesses, corroborated them.

William Frain. Am porter at the Southern Hotel; saw Mr. Maxwell several times; he used to come and inquire of me for a piece of baggage he said he had lost. On the morning of April 6, 1885, at about 8, two new trunks came to room 144; one was a yellow packing trunk and the other was a square sample trunk; I took the two trunks up; found no one in the room. There was a lot of clothes and tools scattered about on the floor in great confusion. These were lying in the middle of the floor near the zinc trunk, and looked

as though they had been tossed out of it. The zinc trunk was all roped up and tied up; set the two new trunks down on the floor and left the room; went up there again about half-past 9 and found Maxwell in the room. He pointed to one of the trunks and told me to take that down. He appeared to be very much excited and nervous. The trunk he asked me to take down was one of the two trunks I had taken up to the room at 8 that morning. The clothing and articles I had seen on the floor at my first visit had disappeared. He told me he was in a hurry to catch the train. The head porter assisted me to put the trunk on top of the omnibus. Maxwell appeared with a valise and hat box in his hands and also had a leather strap around his body, with an opera glass case in it; told me he was not going away, but only wanted to get that baggage on the train, and that he was coming back. He left two trunks and a valise in the room 144. I do not remember seeing him after that. The empty trunks I took up to room 144 that morning came from the store of Charles Bieger.

Tony Freitag. Am porter at the Southern Hotel. On Tuesday, April 14, 1885, was instructed to bring down two trunks and two valises from room No. 144. When I entered the stench was very strong. I wheeled the trunks out, ran them upon the elevator and brought them down to the office floor. Tom Manion, another porter, took the trunk that smelled so bad out on the sidewalk on Fourth street, and Charles Bieger, the trunk man, was sent to open it. The trunk

was bound up with two straps and a rope. Mr. Bieger first loosed the straps and then cut the rope with his knife; saw the dead body in the trunk. The trunk with its contents was then taken to the morgue, where I afterwards saw it; identified the corpse in the morgue as the one found in the zinc trunk which I took from room No. 144.

May 20.

John B. Armo. Am a barber at Hickman's shop, 15 N. Broadway. Monday, April 6, 1885, between 6 and 7, Maxwell came into the barber shop and said: "Can you shave me?" I said, "Certainly, if you will let me." He said, "I suppose you have a good clean razor?" He remarked that Mr. Duff, of the firm of Hart & Duff, hatters, had sent him there to be shaved; told me that his name was Maxwell; that he had been a physician in the Turkish army; that he was stopping at the Southern Hotel and would be in the city until Wednesday. He gave me a prescription while there with his name signed to it, which I afterwards got filled at the drug store of Mr. Fernow.

I shaved his face smooth except his mustache. He had a beard all over his face when he first came in. His beard, mustache and hair were light. He said: "I want you to take all of my beard off." While I was cutting his hair he said, "I wish you would be in a hurry—the fact is, I ought to be going at 7 o'clock." When I got through he said, "Would you know me now if you had not seen me with my whiskers on?" I said, "No." He

said, "Do you think they will know me at home?" I said, "I don't think they will unless they are very close observers." Was very talkative and very nervous all the time he was in the shop. As I shaved him he would raise himself up and look around every time the door of the shop was opened, and any one came in; told me he expected to go South; that he had just come here and stopped at Hart & Duff's to get a hat.

James Johnston. Am salesman in the store of A. S. Aloe & Co., opticians. About April 4, 1885, Maxwell and C. Arthur Preller called at our store. Maxwell wanted to know whether our Mr. Aloe would buy a magic lantern, or stereopticon, as he called it, which he (Maxwell) had bought on the other side, thinking he might want to use it, but as he found he had no use for it he wanted to sell it. He had a number of views and other material appertaining to his stereopticon, and he exhibited a list of these; stated that he was stopping at the Southern Hotel. Mr. Aloe said he would send to the hotel and value the material, and Maxwell said, "All right, but not just now." They then both went out. In the afternoon Maxwell came back and said that he would not be able to show those articles, as some of his baggage had not yet arrived. He came in again by himself early Monday morning, April 6, and said that he wanted to get a pair of spectacles. I asked him what style of frames he would have, silver or gold? and he said, "Gold." He then asked, "Have you any lenses with a smokish tint?" I told

him I had none made up. I got out the lenses and let him select the shade he desired. He said that he wanted them done by 11 o'clock, as he was going away. He then went out and came back between 11 and 12 o'clock, and the glasses were ready for him. He walked out. In about ten minutes he came back and said they didn't appear straight. Then he began looking into the case where we keep field glasses. I showed him three or four, and he selected one for twenty-five dollars. He put his hand in his pocket and pulled out a large roll of bank notes. They were all large bills, most of them one hundred dollar bills. There were twelve or fourteen of these. When I gave Maxwell the change he remarked that he didn't like to have such large money in his possession, and that he was going to break them all; that when he made a purchase he didn't want to pull out so much money; showed him a pocket compass, but he did not purchase it, as he said he had one on a locket on his chain, and he showed it to me. He also looked at some surgical instruments. He took up a stethoscope and called it by name. I said, "What did you call that?" And he said, "I ought to know; I am a doctor."

Fred Castle. Am at the Southern Hotel cigar stand; Preller and Maxwell bought cigars of me several times; last time I saw them together was in the afternoon of Easter Sunday. They came to the cigar stand for a box of cigars. Preller handed me a ten dollar bill in payment; charged him five and a half dollars and returned him the

change. This brand of cigars is imported from Havana. The key clerk sent them to room No. 144; that is the last I saw of Preller. Maxwell came to the cigar stand just before passengers for the Vandalia Railroad left the hotel, and asked for a couple of cigars. I asked him, "Do you want the same kind of which he bought a box yesterday?" He said yes, bought two, and went out after the porter who was carrying up his hat box.

Nicholas Mansfield. Am a member of the police force here; one morning in April, about 9, I took a trunk from the sidewalk of the Southern to the morgue; it had a dead body in it; afterwards I took another trunk from the hotel; that had a lot of things in it in a confused heap, glasses used with dark lanterns, a couple of razors, a lot of little files and a lot of doctor's things.

Henry J. Thierauf. Am a druggist at Mastbrooks under the Olympic Theater opposite the Southern Hotel; prisoner the first week in April came in and bought some chloroform; a couple of days after he got a glass of vichy and some spirits of ammonia.

James Tracy. Am on the city detective force; examined the baggage which was brought to the police department from room 385, Southern Hotel. There was no money in it; there was a lot of letters; was sent to New Zealand to extradite prisoner; we left Auckland with him July 21, 1885; his trunks were turned over to us; also two valises and a hat box (these are the ones); they contained this revolver, gold

chain, diamond ring, flask spectacles, cap, sleeve buttons, silver watch, two pencils, a cutter for cigarettes, some cartridges, some books, all these things now before me. There was a paper which he told me was addressed to the minister at Paris; said it was in French, as he was born in Paris, and that his name was Theodore Cecil D'Auguier; said he was an attorney and had never practiced medicine. I asked him one day: "Maxwell," I says, "Why do you not drop that assumed language that you got and speak the English in its proper form?" "I cannot speak it." I says, "What are you using that word 'zee' for all the time?" "Well," he said, "I cannot pronounce the word 'the.'" These cuffs and handkerchiefs marked C. A. P. were in his trunk also, these towels marked Southern Hotel, also this shirt and drawers marked C. A. P., also this writing case; he said he had obtained these things from a man named Robinson in San Francisco; I never made any threat to induce him to talk; always treated him with kindness; said he stopped at the Palace Hotel in San Francisco, and had a good time on the steamer from New Zealand. I showed him Preller's photo and asked him if he knew him. He said, "No, I never did, I was not acquainted with the gentleman." I says, "Don't you know whose picture that is?" He said, "No," I said, "That is Mr. Preller's picture-photo." "Well," he says, "I have got a very bad memory." "Now," he says, "As long as you have been with me I may in the course of two or three months

fail to recognize your picture if I saw it."

Afterwards he told me he got acquainted with Preller in Liverpool, and that the last he saw of him was in Boston. There were also in his baggage this field glass, blotting pad and photo album. He told me he had about \$1,000 when he left St. Louis.

Selvin C. Edgar. Reside in St. Louis. On the sleeper, 6th or 7th of April, I traveled with prisoner; he first spoke to me showing me these field glasses, and asking me if they were good ones; he took off his hat and I saw the mark Hart & Duff inside; he showed me those sleeve buttons; noticed a small diamond ring on his hand, he said it was a souvenir of the Turkish war; that he was going to San Francisco, and showed me that revolver; said women could be bought cheap in Turkey; said he was an Irishman, raised in Paris.

Cross-examined. Prisoner did not seem to want to conceal anything, but talked like a fellow who likes to tell big stories.

Solomon Bauman. Am in the wholesale jewelry business here; was on the train from here Monday night, April 6th; next morning at breakfast met prisoner; after we smoked and had a chat he told me he was French-Irish and was here in the interest of the Turkish Government; said he did not enjoy his breakfast as he had a hearty dinner at the Southern the night before; said he had been in battles in Europe and had gained great laurels; he was very nervous and flighty in his conversation; he wore a big coat or gown too large for him.

Cross-examined. The big gown

attracted attention; made him very conspicuous in the smoking room; he told his stories to quite a lot of passengers; he looked as though he had been on a spree.

Henry A. Barmaier. Am secretary of the Bauman Jewelry Company here; was with Mr. Bauman on the train; noticed the prisoner on account of the large pouch he carried his tobacco in; heard him talking but did not follow the conversation.

Gustav H. Ruedi. Am a clerk in the postoffice here; saw prisoner in Bengel's shooting gallery the evening of Easter Sunday; he said he was Two-Tailed Pasha; he had a large revolver which he said he carried, as he sometimes had \$2,000 with him; that he had a pension from Turkey; said he could shoot a man on horseback at 200 yards; as he went out he stumbled and fell and his hat went off; seemed to be drunk.

May 22.

John F. Ryan. Am Superintendent of the St. Louis Morgue; on 14th April, 1885, received a zinc trunk from the Southern Hotel, containing the corpse of a man. It was brought to the morgue in the police patrol wagon by Officer Mansfield of the police force; took the body out of the trunk and placed it in the room used for post-mortem examinations. There were two straps and a lot of rope around the trunk, and on the rope was sealing-wax; it was marked W. H. L. M. The body was in a cramped position and was clothed with only a pair of drawers. Upon one end of the trunk inside was pasted a paper about

four by six inches, on which were written: "So perish all traitors to the great cause."

Cross-examined. The body was so discolored that when we put it on the slab in the morgue for exhibition and identification it was marked "white."

George W. Badger. Belong to the detective force here; first saw prisoner in the jail at Auckland, N. Z.; found this box in his canvass valise and turned it over with the vials in it to Dr. Luedeking of Washington University.

Dr. Charles Luedeking. Am instructor of chemistry in the Washington University; have studied chemistry there and at Leipsic, Heidelberg and Freiburg; also studied at the St. Louis College of Pharmacy; am a graduate in chemistry in Leipsic; secured a glass jar from the Coroner's office containing parts of the viscera of the body of Mr. Preller and to make a chemical analysis looking to the discovery of poison; examined the stomach first and found traces of reaction from chloroform; the parts were congested by chloroform; examined the lungs because I could tell better from them; found traces of chloroform from four or five different reactions of the lungs. My first method was that of Dr. Ragsky. The vapors in the viscera are distilled and the vapors are passed through a red hot tube. The description of the test is purely technical and uninteresting to any excepting practical chemists. The other lung was distilled in a current of steam and Dr. Hoffman's test was used. One other test was used, and all of them showed distinctly the

presence of chloroform in the viscera. Traces of reaction for alcohol were found in the stomach, but alcohol is generated in the decomposition of the human body. The decomposition of animal matter never generates traces of chloroform; do not know how long a human body will retain chloroform; have tried several experiments on dogs. In one case a dog was killed by chloroform and after six days, when the body was badly decomposed, a test disclosed traces of chloroform. In another case the body of a dog killed by chloroform was boxed up during the summer heat for ten days. Reaction from chloroform was found. In another case the lungs of a dog killed by chloroform were placed in a loosely covered jar for fourteen days. Reaction for chloroform was found. Experiments were made for three weeks and over, and chloroform reaction was obtained. The result of these experiments was that decomposition does not generate chloroform, and reaction for chloroform can be detected in a body dead as long as Preller's when the analysis was made. Among my conclusions as an expert are these: that chloroform preserves organic matter, and therefore the time in which it can be detected is lengthened; when chloroform is taken into the lungs it is imprisoned there and not absorbed, and the affinity of chloroform, proved by test, would tend to keep it in the lungs as if bound by the action of the blood. It requires, according to accurate calculation based on tests, about forty grains of chloroform to produce uncon-

sciousness in a man weighing 150 pounds. It would be impossible to state the exact dose sufficient to kill. Chloroform kills rapidly by various causes and only a little more is required to kill than to produce anaesthesia. As to the time of death, can give no definite answer, as it is variable, rapid in some cases and slow in others. One minute after beginning to inhale is the quickest case on record. Only thirty drops were taken in this case. Four ounces have been known to be taken internally without fatal effect. Ten to twenty drops by inhalation and one to four grammes internally are medical doses. The case of the hypodermic syringe handed to me I examined and found that the vials contained morphine. Do not say how the chloroform was administered to Mr. Preller or whether it or chloral hydrate was taken, but will say that I found chloroform in the lungs and stomach submitted to me.

Cross-examined. It is almost impossible to know what dose will kill a man. You hear of cases all over the country every year where persons have been killed by it in dentists' chairs and in the performance of surgical operations. Often at the hands of the most skillful physicians. There are poisons which are not very difficult to manage when they act in a manner not expected, poisons that can be steered clear of and chloroform, I suppose, is one of the most objectionable in that respect. One of the most uncertain. The manner in which people that are under its influence are resuscitated is by cold water action, bringing

the circulation into activity. It would be impossible to do anything where the substance which is doing its work, such as chloroform, is being distributed through the body. And it would be more difficult where it is inhaled than where it has been taken through the stomach. There is a chance of taking it from the stomach by a pump or an emetic. There it is beyond reach because it is in the circulation, whatever gets there we cannot reach. If it is going to act fatally, it will; if it is not enough we can reach it by antidotes after due time.

F. W. H. Wieseahn. Am a professional penman and expert in handwriting; I have examined the following documents submitted to me by the Circuit Attorney and either unsigned or signed W. H. Lennox-Maxwell, Walter H. Maxwell, W. H. M. viz. the paper writing, "So perish all traitors to the great cause," letters to C. A. Preller, druggists prescriptions and the register of the Southern Hotel; have made a careful and thorough comparison of all the writings with each other and subjected them to all the tests of comparison in my art, and upon the basis of my experience pronounce them all to have been written by the same person.

William Desmond. Am an officer of the city police force; the day of the finding of the body went to room 385 of the Southern with Sergeant Burke; we found there four or five trunks, a hat box, a couple of hats, a bag and pair of kid gloves on the floor; the things were taken to the chief's office

and the trunks opened; in them was clothing marked C. A. P., books, samples of gents' clothing, shirts and a dress suit and a number of other things.

May 21.

Amadee A. Mellier, Jr. Am a druggist in the Southern Hotel building; Easter Sunday about 2 p. m., prisoner and Mr. Preller came in; the former called for a glass of bromide of potassium to quiet his nerves, which I gave him; Preller looked at some sponges, saying they had better get them now before they started for San Francisco; he bought one and a bottle of toilet water and some other things to the amount of \$7; he paid for them from a large roll; I took them into the hotel to the office later and saw them both standing at the cigar stand.

August E. Bengel. Keep a shooting gallery corner Broadway and Chestnut; Sunday evening, April 5th, about 9, prisoner came in and said he wanted to shoot; that he was an officer in the Turkish army and usually shot with a pistol; that with that he could kill a man on horseback at 200 yards; asked me about the servant girls at the Southern and if there were many fast women in town; spoke about the women in Turkey; said his title was Pasha of two tails, and when he traveled in state there were two couriers ahead who carried two tails, and that you could buy women there for five dollars each; Monday afternoon he came in again; said he had bought a pair of opera glasses for \$50 and wanted to try them on the target; he shot about

eight shots; asked him if he was going west; he said, no, he was going back to England, as there was going to be war.

Cross-examined. Thought he was drunk the first time; didn't believe his talk; thought he was simply talking to hear himself talk.

Campbell O. Bishop. Am in the Circuit Attorney's office; examined the contents of a trunk from room 144, Southern Hotel; found this match case and silver watch, this bottle which had a little chloroform in it; a number of books on surgery; some sealing wax and a lot of sheet paper; compared the paper on which was written "Perish all traitors, etc." with these sheets; they are the same.

Cross-examined. Did not find any letters from Preller in the trunk; I also examined several trunks marked C. A. P. One of them contained clothing, that is, suits of clothing; one contained underwear, linen, socks, collars, neckties, gloves, things of that kind; one was almost entirely filled with books and two were filled with samples of some sort, cloths. The books were almost altogether musical books and religious works, several Bibles and testaments, portions of the Scriptures and commentaries, leaflets, tracts, religious meditations and things of that kind. The samples in the trunks seemed to be cloths and fabrics of superior order, Japanese goods, silks, curtain goods, goods such as I have seen used for lambskins, cloths for coaches; some goods were of a very delicate fabric, such as plushes and velvets of all shades. There were

a great many letters there that purported to be from Mr. Preller's relatives, but the bulk of it seemed to be copies of letters which he had written himself to his employer in regard to his business. The letters seemed to be addressed to one J. H. Dickson, Bradford, England; there were a great many business cards and labels marked with the name of Dickson, together with bill-heads, letter-heads, envelopes, circulars, memorandum books of prices and things of that sort.

John Arthur Frazer, Jr. Live in Toronto, Canada; am a photographer, portrait painter and sculptor; knew C. Arthur Preller, in the Rossin House, Toronto, Canada, year ago last February; he was straight and well developed, with dark complexion and dark brown hair that had a sort of bluish tint when light fell on it; was well rounded, had a most benevolent expression of face and a Jewish cast. His manners were those of a cultured gentleman; have a photograph of Mr. Preller (exhibiting). This was painted by one of my staff, and finished in oil by myself. Last August, while I was sick, my brother

came into my room and handed me a photograph of some dead person. I looked at the picture again, and said: "My God, it is Arthur Preller;" went downstairs and met Mr. Marshall F. McDonald; he told me he was an officer from Missouri. The result of the interview was that I came to St. Louis in the second week of September and went out to Bellefontaine cemetery with Mr. McDonald, Mr. Clover and Mr. Newbold. A grave, said to be the grave of C. Arthur Preller, was opened, a casket taken out, and a body, which I positively say was that of C. Arthur Preller, was taken out; knew it was Mr. Preller by the color of the hair, eyes and formation of the features, but above all by a small scar perpendicularly over the left eye. It was very small in life, and could not be seen through the glass case of the casket; spoke of the scar while driving out to the cemetery to Mr. McDonald and Mr. Ryan, and pointed it out on the remains when they were exposed to view. I identify the photograph of the body taken at the morgue as that of C. Arthur Preller.

John McCullough (sworn).

Mr. Fauntleroy. Your Honor, we know all about this witness and what he is called to say; and we object to his testimony as incompetent. This man has not only acted as a liar and as an imposter but he has done it in court; he has actually passed himself in court as having committed a crime. We will show he was indicted by the grand jury for an offense and we object to this evidence on the ground that any one who will do this is utterly unworthy of belief against any one in court, and ought not to be heard in any court of justice; because when a man will go so far as to use not only the usual wiles and blandishments used by detectives to get statements from persons accused of crimes, but will go so far as to have himself held for a crime such as forgery and then go to jail and have

himself indicted; that that man's word is unworthy of belief whether on oath or not on oath and is unworthy of belief in a court of justice; and that the evidence under these circumstances as to any statements he may make as to what was or what was not said by this defendant is irrelevant and ought not to be received.

The Court. The questions that you raise may be proper questions in an argument before the jury; the Court cannot sustain them on these grounds.^a

McCullough. Have been a detective for five years past—with Pinkerton's force in New York for three years—have worked for A. L. Drummond's United States secret service; was last employed by Wannamaker & Brown, Philadelphia; am now employed on Furlong's secret service force of the Missouri Pacific; was instructed by Mr. Furlong to work up this case. Went to jail and voluntarily became a prisoner for this purpose, under the assumed name of Frank Dingfelder — spent forty-seven days in jail. There was an arrangement by which I was to attempt to pass a forged check, to be arrested by Furlong in the act and then sent to jail. There I was to cultivate the companion-

ship of Maxwell and get a confession from him, if possible. In due time I was arrested and lodged in jail with Maxwell; waived a preliminary hearing in the Court, and later was indicted by the grand jury for the assumed offense; am now under this indictment and am out on bail; first met Maxwell in the jail, on Feb. 26th—would then meet him daily twice a day thereafter at exercise hour for an hour at a time. Maxwell introduced himself to me and told me he was in on a charge of murder in the first degree. About ten days after he became confidential. I had represented that I was the leader of a noted gang of forgers, and had an extensive acquaintance with the fine cranks

^aIn affirming the conviction, the Supreme Court said: "It is further insisted that owing to the methods resorted to, to obtain the confession, it was error to receive it in evidence. While the officers whose duty it was to prosecute criminal offenses, may, in their anxiety to ferret out the circumstances concerning the death of Preller, have overstepped the bounds of propriety in the course pursued by them, which is not to be commended, but condemned, it affords no legal reason for rejecting the evidence and not letting it go to the jury whose peculiar province it was to pass upon the credibility of the witness who detailed the confession and give to it such weight as under the circumstances they believed it entitled to. It was for the Court to say what evidence should be received and for the jury to say what weight it should have when received. While the fact that artifice and deceit were resorted to in obtaining the confession might properly be considered as affecting the credibility of the witness it did not render him incompetent as a witness." 92 Mo. Rep. 576.

of this country. Maxwell stated that the officials and others thought they were "fly," but that they were not, and had failed to break him down. He said the chief of police had tried to pump him and had failed. He said the chief showed him Preller's picture and asked him if he knew the man. Said he told the chief he did not; told me that he did recognize it. He thought I belonged to a notorious gang of forgers and was in a bad fix. I told him if I had a chance at an alibi I would prove it. He asked how, I said: "By my people." He said, if he had a witness who could testify right he could beat the State. I asked him how. He said, "If I could get a witness who could testify that I had so much money in Boston I could get free." I asked, "How much money?" and he said, "About \$700 or \$800." I told him I would try to get some of my people (gang of forgers) to do him this favor, to testify for him, and I asked him to tell me about his case. He first said he met Preller in Liverpool. Wanted Preller to go to a fancy ball, but he refused to go because it was fast. Afterwards he said he met Preller about three days out from Boston. He said he left England to avoid testifying in a case. When they arrived in Boston they took rooms at Young's Hotel. Several days afterwards he (Maxwell) went to board, and Preller stayed at Young's two weeks. Preller went to Canada then and he remained in Boston. He said he left Boston on the last Saturday in March, and went around by Canada.

He arrived in St. Louis, registered at the Southern; asked about a telegram of the clerk. The clerk said one had been received asking if he had arrived. He answered it. On Friday Preller arrived. They had a talk about going to Auckland; he was anxious that Preller should go to Auckland. Preller told him he had only enough money to see himself through in the trip. He said he made up his mind on account of this meanness to fix him. On Sunday, Preller was in his (Maxwell's) room and complained of pains. He told him he could remedy it by using a hypodermic syringe and agreed that he should try it. "Preller," he said, "took off his coat and vest," and he said he gave him a good dose in the arm, which put him to sleep. When he was asleep he used some chloroform that he had there, and when he found that there was not enough he went out and got some more chloroform. Then he found he was dead. He took off his clothes, took his money and cut off his undershirt and shirt and took off his drawers. He threw the things out, put him in the trunk and left the things in the room. This was 4 or 5 in the afternoon. He said he stayed around until Monday morning, when he went out and bought several things, trunks among them. He then packed his own trunk, putting the things he had taken from Preller's body into it. He bought a ticket for San Francisco, for which he paid \$116.

He told me he had about \$700, taken from Preller; then went out and got a field glass; said he

spent \$36 here, but did not say what for. He spent \$20 on the trip to San Francisco. He wore a long gown, he said, on the trip. When he got to 'Frisco he went to the Palace Hotel and took a room; said he lost his keys on the way out, and paid a man \$2.50 to open his trunk. In the evening he went out to take in the town. The first man he met was a confidence man, who said he was going out on the steamer. The man said he could not get his money, and wanted \$100. Maxwell said he did not have the change, but finally for his watch gave him \$80, expecting to get it back next day. The man left, and he (Maxwell) took several drinks and walked around until he came to a house of ill-fame. He went in and broke a few bottles of wine. He met a girl named Grace, with whom he went upstairs. After a while the girl went downstairs and he did not know what to make of it. When she came up again soon after he drew his revolver and she asked him what was the matter? He said, "It is a good thing you are not a man." She asked, "Why?" and he said that he had just killed a man, and did not propose to be arrested. He stayed all night and went to the hotel in the morning, wrote a letter and left it at the hotel.

He said he had lots of fun out of it; that it was the greatest spider-leg chase he ever saw, and that in looking for an Englishman they wouldn't pick up a Frenchman; said the clothing he stripped from Preller's dead body was in his trunk in the steerage part of the vessel, and he could not get at it; if he

could have gotten at it he would have thrown it into the Pacific; said he had a pleasant trip; said he had \$140 when he reached there, and told me about his experience in Auckland. I asked Maxwell what he wanted, and he explained that he wanted a witness to prove that he had a large sum of money before he left Boston. The witness could say that they had met him in a club room at Young's hotel and had called at his room. They could state that they were with him and that on the day he left Boston they dropped into Murphy's to take a drink, and Maxwell treated. That he had a large roll of bills, and one of them suggested that he was careless in carrying his bills so loosely in his pocket, and they could swear that they saw \$500 or \$600 in bills, he didn't care much what.

Maxwell and myself then agreed on the manner of making up the story and of posting my alleged friends how to testify. It was first suggested that my two friends be introduced to Maxwell's attorneys and then brought into jail to see him, but this was dropped. Maxwell said he might give bond and get out, so it was agreed that they should arrange for the meeting by fixing certain means of identifying each other. On a card Maxwell wrote "Frank Dingfelder," with "2 w" under each end of the name. "2 w" meant two witnesses. The card was torn irregularly into two pieces, Maxwell taking one and putting it in his drawer in his cell and I taking the other. The understanding was that my people, when they called were to present

half the card, and thus identify themselves. We further agreed, that he should write me under the fictitious name of "John F. Mann." The card that I tore, my half of it, I have here in my hand. It has on one side "Hon. John I. Martin, Attorney-at-Law, St. Louis, Mo.," and on the other "1508 Washington street and Young's Hotel. The cards I have with me and here present them.

Maxwell further said he wanted the two witnesses I proposed to get him to falsely testify that they met Preller in Boston some time in June, 1885, and spoke to him, but Preller asked them not to say anything about seeing him, as it might prevent him and Maxwell getting the money they wanted, but afterward he said he did not want this testimony, as the defense would probably be accidental killing. I said something about the money that my friends were to swear to, and Maxwell said there would be no trouble about perjury, as there was a barkeeper at the Southern Hotel who would swear that he had \$700 with him. He said he wanted that sworn to, as it was the missing link, and that the Southern Hotel barkeeper would thus corroborate the story. A few days after I got in jail a man was shot. The prisoner said that if he had a man to kill he would not do it that way, the chloroform was so much easier. I got out of jail after this on bond and went to New York. I had an understanding that I was to write to him, the prisoner, putting the letter inside of an envelope addressed to John I. Martin. I did that. Maxwell told

me that he made Preller's acquaintance in the following way: that he was introduced to Mr. Preller on board the steamer by one of the employees. Preller showed him letters of introduction to officers of the United States Steamship Company. He then thought he would work Preller for those letters. He wanted to get Preller to secure him a position. He afterward gave up the idea when he learned that the company paid only \$30 and board.

Cross-examined. Was never in prison before this time; the Circuit Attorney's office knew all about the sham charge; was bailed out by Judge H. D. Laughlin; the plan was with my consent, but I had nothing to do with arranging it. I was simply obeying orders; in my business we have to lie; when we are working with criminals we have to meet them with their weapons; am not ashamed of what I did here; the end justifies the means; do not refer to my evidence when I say this, for when one is on the witness stand he is dealing with honest, straight men; when I am dealing with criminals I am dealing with crooked men. Would not lie to convict a man I knew guilty; I get a salary from Mr. Furlong, it was not increased for my going to jail; Maxwell first proposed that my friends should swear that they saw Preller alive in June in Boston, and then he said, "Just wait until I see my attorneys, and then we will find out about that," and he told me in a few days, "No, our defense will be accidental killing, and we don't want 'em to say nothing

about that, but we want 'em to swear that I had seven hundred dollars leaving Boston, something about that amount." When Maxwell gave me that card he wrote the name on it and gave it to me for me to address, and the letter was to be addressed to him in the jail, and the other letter was to be addressed to his

counsel so that they would bring it right in to him and give it to him. I told him, "I don't want anything to do with your attorneys." I says, "I don't want to have anything to do with them." He says, "That is all right; they will bring it direct to me and I will write the answer and they will bring it out."

Mr. Clover offered the following letters:

Astor House, New York, April 19, 1886.

Friend Maxwell—According to promise I will write you. I first arrived here. I had the d—'s own time getting away from East St. Louis. I waited for my articles there. I saw my two friends and gave them all the points in your case, and now they are southwest, but will be at the Laclede Hotel at 8 o'clock p. m. on Thursday, April 29, 1886. Write me at once if your attorney can meet them and have a talk over the matter and get them ready to do the work to be done when wanted by you. Your attorney can talk to them, as they understand what they are to do. Answer soon as possible.

Yours truly,

John F. Mann.

Martin & Fauntleroy, Attorneys at Law, St. Louis, Mo., April 23, 1886.—John F. Mann, Esq., New York City. Dear Sir:—In reply to yours, will meet your friends at their office instead of the Laclede Hotel on Thursday or Friday, April 30th. Yours respectfully,

Martin & Fauntleroy.

Astor House, N. Y., April 26.

Martin & Fauntleroy.—Dear Sirs:—Yours of 23d received. Have written my friends but can't say if they will go to your office. I wrote you the Laclede Hotel; I don't understand why you don't do it. My friends may think it looks like a "job," or a man in a closet, and they are doing this to befriend Maxwell; and if you can't meet them as I requested they can use their own judgment about assisting M. out, as I can't insist on them going on anything that looks like a job. These men do not want to be seen running in and out of your office, and, as you know, your office is so near police headquarters. I will leave here in about five days; if you will write me at once and state your date that will suit you to meet them at any hotel in St. Louis in case they fail to go to your office on the 29th or 30th of this month, I will, on receipt of your letter, telegraph them to meet you at any hotel you mention in your letter. Respectfully,

John F. Mann.

Martin & Fauntleroy, Attorneys at Law, St. Louis, Mo., April 30, 1886.—John F. Mann, Esq., New York City. Dear Sir:—In

reply to yours of the 26th inst. would say that your friends did not put in an appearance at the Laclede Hotel or at the office last night or today. Your friends can meet me at Laclede Hotel at any time they suggest. They can telegraph or send me message upon arrival. Respectfully,
John I. Martin.

Gilsey House, N. Y., May 4, 1886.—Hon. John I. Martin, attorney-at-law. Dear Sir:—In reply to yours of the 30th inst. will say I sent word to my friends and they decline to see you, as they are suspicious for some reason, but I will see them in a few days and may arrange things for a meeting. I leave here tomorrow, but if you write me here I will get it, and if I can get things fixed I will let you know from some other point. Yours respectfully,

John F. Mann.

Boston, Mass., Feb. 20, 1885, 1508 Washington St.—My dear Mr. Preller: I have been making inquiries, and find that we can get regular tickets here to Frisco for \$64.25, or if we started at 8:30 a. m. for \$61.25. We can have a sleeper free from St. Louis. Trains run every day. Journey takes about ten days, and people of similar classes are put together. So we should not have to mix up and sleep with the dirty Irish, Germans and other pigs. When do you intend to start from Boston or New York? Believe me, very faithfully yours,
W. H. Lennox-Maxwell.

1508 Washington Street, Boston, Friday.—My Dear Preller: Many thanks for your chatty letter. I cabled Gregory, and the reply was: "Chancery proceedings pending. Have written." I suppose their letter will arrive by the Cephalonia on Saturday or Sunday. However, in any event, I must give up all thought of ever seeing much of my property now the lawyers have hold of it. I have about \$100 in cash, and if I sell my lanterns and slides, etc., I ought to raise from \$150 to \$200 at least. I, however, scarcely know how to dispose of them. I don't care to carry them across to New Zealand, as if I go up country they would simply be of not the slightest use to me. If I could dispose of all my superfluous and useless articles, I ought to raise about from \$300 to \$500. In any event, I have finally made up my mind not to stay in Boston. Neither shall I go out to Allston. I might, and very probably should, soon have good practice over there, but I am too thoroughly English, or rather Scotch, to care for these Yankees. They have not the thoroughness we like to find in a man, and I think that they are not to be believed or trusted at all. Their sole aim and object in life appears to be "money grabbing," a thing I hate and detest. I like your idea of scratching across the continent very much, and should certainly go the cheapest way I possibly could. I have traveled too much and too often with all sorts and conditions of men to be at all particular as to the class I travel, or with what class of people I travel. I know my own social position, and that, even if I.

had no shirt to my back or a pair of pants to cover my legs, I should still be a descendant of the old Scottish chiefs, and I trust by the grace of God a thorough (English) gentleman. Secure in these two things, I care not whom I associate with so long as I can say with my ancestor, "I kept my honor unsullied." I should very much like you to give me your opinion as to the best method for me to dispose of my lantern and slides (if you know). Drop me a line by return mail, and whatever your advice is I will follow it. I place myself altogether and unreservedly in your hands, but at any event I shall not remain in Boston. I inclose you another prescription, which I trust will do your head good. I was very sorry to hear that you had been ailing. I do not care if I have not a penny to land at Auckland with. "I would not be the first time I have been spent-up and without a cent. The last time was in Italy, and I got home all safe. (Worked my passage to London.) Believe me, very faithfully yours,

W. H. Lennox-Maxwell.

C. A. Preller.

Boston, Mass., 1508 Washington Street, February 20, 1885.—Dear Mr. Preller: I must really apologize for not writing earlier, but I thought I would get settled down before doing so, hence the delay. There is a sitting room here, and I was introduced to the girls the first night I got here. They are very pleasant people, and, taking all things together, I am very comfortable. I however, do not intend to stay in America, but intend as said to go to Auckland. . . . I went to the rink the other night, but did not see the girls. It is not first-class. The Highland is the one. The girls we saw are not the ones staying. The Highland Rush is the rink, and they go there. One is called Mary and the other Rennie. I do not know their surnames. I went down to the naval office to see Powers. While I was there Morris came in. He looked considerably surprised to see me. I find from the Gazette that Christ Church College has given me my M. A. and M. D. They were given because I held the B. A. and M. B. over seven years. I certainly did not ask the Dons for the further degrees, and in fact it was a matter of perfect indifference to me whether I ever got them or not. I am now on the lookout for an appointment as surgeon on some ship—not between Boston and Liverpool, I want a longer voyage. If I could get it, I should prefer New Zealand or Shanghai, and around the world. I like the sea immensely, and should like to spend some years on it. At all events, drop me a line when you expect to be in Boston, and I will meet you at the depot or anywhere else where I am. I am going to Allston to see Powers this afternoon, and am writing this in bed. I am awfully lazy this morning. I do not know the reason. I suppose it is knowing no one, and I do not care to make acquaintances—I cannot say friends—of the cute Yankees. Believe me, yours ever faithfully,

Walter H. Maxwell.

If you hear of any appointments please remember me.

W. H. M.

Michael J. Kennifick. Am a deputy sheriff; about Dec. 12 I brought prisoner into a room of the Circuit Attorney, where there was a gentleman by the name of Brooks and another person from England. They recognized each other.

Mr. Fauntleroy. We admit all this; that we brought this defendant's father here and he met his son in the Circuit Attorney's office; and it was well understood by every one—Mr. Clover was told and everybody—that it was the defendant's father; and it seems to me that the State might be satisfied not to drag out here the silent grief.

Mr. Clover. I want to show it was the first time the defendant ever admitted that his name was Hugh M. Brooks, the first time that he laid aside his aliases.

Mr. Fauntleroy. That is not a fact. The public press of this city has heralded the fact that this defendant admitted to McEnnis, the reporter of the *Republican*, that his name was Brooks.

Mr. Clover. He afterwards denied that himself.

The COURT. Do you admit it or not?

Mr. Fauntleroy. As I understand, the Court asks whether we would admit that this man's name is Hugh M. Brooks?

The COURT. I don't ask you whether you do or not. I say this, if you do admit it that is the whole of it.

Mr. Fauntleroy. In addition to that I will state that this defendant not only admits it now but in these depositions in this case; that he has admitted it all along; that this meeting in this room was made under an arrangement with Mr. Clover for him to meet his father.

Mr. Clover. I wished to prove that was the first time it was authoritatively known that this man's name was Hugh M. Brooks; that previous to that time it was a matter of conjecture as to what his name was.

Mr. Clover. The State rests its case here for the present.

Mr. Fauntleroy. Your Honor, we ask that the coroner who made the post-mortem be placed on the stand. I have never in my life seen such a proceeding before that the State would suppress and keep back from the jury the only evidence in the case taken by them by an officer of the law to show the cause and the manner of that man's death. Suppose that doctor stated that from his examination of the body he believes that the death was a natural death; that he has examined the brains of that man, the lungs, the heart, every part of him and he finds no evidence of strangulation, he finds no evidence of suffocation, he finds no evidence that the man came to his death by violent means, he finds no evidence that any hypodermic syringe—any morphine, was injected, the contrary he finds that the physical condition of the body, the condition of all those organs of that body that he, as a scientific man, and as an officer of the State,

can explode this theory of the State, and each and every one of them. Would not that shed some very important light on this controversy? Are we not entitled to that evidence? And I say that we are entitled—when they do not call him—to the presumption that arises from the suppression and the keeping back, I don't care from what motive, of this evidence.

The COURT. To take the course you ask me to do would be extrajudicial, and the Court has not the power to do so. We courts sit as impartial arbiters in deciding the law and in carrying out the law so far as it is presented to them; but for me to undertake to interfere with the prerogatives and duties of the Circuit Attorney in presenting a case which is his province alone, would be something that this Court has never heard of, and which it thinks under no circumstances is a part of its duty. My own opinion about the matter is this: That this Court has no right to compel the Circuit Attorney to produce any witness or to put them on the stand. If the Circuit Attorney sees fit to produce or not any witness it is not the business of the Court. The province of the Court is to decide the questions of law that may come up before it and to hear this case impartially. If the Circuit Attorney neglects his duty it is for the people to say that he is guilty, not me. Neither do I undertake to say that he has not done it. The Court will not make that order because it does not think it has the power to do so.

May 27.

THE DEFENSE.

Mr. Fauntleroy. Gentlemen of the Jury: We, as counsel of this young man, have now the right to disclose to you the nature of our defense. God, the searcher of all hearts, from whom no secrets are hid, and this young man—this boy, I might say—know the true manner of C. Arthur Preller's death. The evidence submitted by the State has shown part of the transactions between these men. This young man now proposes to show the rest and the true manner of the death of Mr. Preller. Mr. Warren has told you how much the young men were together on board the *Cephalonia*; that both were English, and as the voyage was long and stormy, they became quite intimate, visited each other's staterooms and conversed a great deal together. Mr. Warren said a great deal that we desired to prove. He said the defendant told him that he had studied law and chemistry, and as a stranger coming to a strange country enlisted Mr. Warren's sympathies. He asked about the prospects for a lawyer and then inquired what success he would probably meet as a hotel clerk. He was what we would term a greenhorn, and from his open-hearted manner won the sympathies of both Mr. Warren and Mr. Preller. Mr. Warren said he looked upon him as drifting about with no settled purpose. When they arrived in Boston the defendant made up his mind, after a short stop, to go to New Zealand. He had made a slight study of medicine, and, having a foolish confidence in his powers, thought he could practice the pro-

fession. The letters which have been introduced show that he thought of hanging out his shingle at Boston. He treated a girl and used a lot of McIntyre's blanks for prescriptions. Finally he had an interview with Mr. Warren and made up his mind to go to Auckland. He did not represent himself to Mr. Preller as a man of means. He asked Mr. Preller the best way to dispose of his stereopticon, and said that by selling all his effects he could raise about \$500 for the contemplated trip. The State's evidence shows that the defendant prescribed for Mr. Preller several times in Boston. Mr. Preller left Boston first and the defendant followed soon after and came direct to this city and registered at the Southern, where he found a telegram from Mr. Preller asking if he (Maxwell) was at the hotel. Three days later Mr. Preller arrived and the two were seen together. The evidence showed that they were the greatest friends, played billiards together, drank together and went to Mr. Aloe's to try and dispose of the stereopticon. They gave Mr. Aloe a list of the views and then returned to the hotel, but learned that the stereopticon had not arrived. They went to the depot and inquired for it and found that it had been detained at Port Huron for duty. Meanwhile the defendant had been visiting Fernow's drug store the same as he had McIntyre's in Boston. He bought various things and told Fernow that he expected a friend from Canada.

When Mr. Preller came the defendant told Mr. Fernow that his Canadian friend had arrived, and Mr. Fernow said, "Bring him around." Sunday they were seen in Mellier's drug store, and there a conversation occurred that seemed like an interposition of Providence to show the real feeling that existed between these two men. Mr. Preller said, in the hearing of Mr. Mellier, "We had better get all the articles we want here, for we may not be able to get the things farther West."

When the defendant learned that he could not at once realize on his magic lantern, he had an understanding with Mr. Preller that he (Preller) should pay his expenses and that the money would be returned at Auckland.

The defense proposed to show that Mr. Preller suffered from a private complaint and that he insisted on the defendant undertaking an operation for his relief. The defendant demurred and wanted an expert physician called, but Mr. Preller said he did not want to be treated by an outside physician. Finally the defendant decided to undertake the operation. Mr. Preller went to his room and came back in a dressing gown and the operation was begun. These books submitted by the State showing the modes of administering chloroform, were brought out by the defendant and read to Mr. Preller. Mr. Preller lay down in bed and the defendant, who had procured a four-ounce bottle of chloroform and some absorbent cotton at Fernow's, saturated the cotton and held it to Mr. Preller's nose. While administering the chloroform the bottle was accidentally overturned, and the chloroform being useless he made another trip to Fernow's,

and as Mr. Fernow says, "he said he had overturned it like a child." Mr. Fernow says he was not excited but was in a hurry. After securing the chloroform he returned to the room and resumed the operation. While in the midst of it Mr. Preller gave several groans, and thinking that he was suffering pain the defendant again administers chloroform, until finally he discovered signs of danger. In great trepidation he cut the shirt and underclothes from Mr. Preller and endeavored to revive him, and stimulate the circulation by heating him with towels and rubbing him. Finally he discovered that his friend was dead. Then a terrible fear seized him. He did not know the law of the country, and believed that it was the same as in his own country, and that a defendant could not testify in his own behalf. Then he determined to dispose of the body. He will tell you that he threw a miscellaneous assortment of articles out of his trunk and then dragged it to the bed. He put the first pair of drawers he found on the body and not being able himself to carry the body, rolled it from the bed into the trunk. He found Mr. Preller's money in his pants pocket and determined to use it to effect his escape. There was a large roll, but he does not know the exact amount, but there were several \$100 bills. That night he became very much frightened and drank to excess. It flashed upon him that he was in danger, and next day he visited the trunk store and various other stores where he had been before and exhibited the money. That Monday morning he determined to destroy the identity of the body. He opened the trunk and cut off Mr. Preller's mustache, cut the cross on the breast and wrote the placard, "So perish all traitors to the great cause." Then he strapped the trunk up and packed his own baggage and left, as he told the porter, for the Vandalia train. He was undecided and he told the porter that he was coming back and after going to the depot did come back and made there various purchases referred to by the witnesses of the State.

We will show that this defendant is addicted to chloroform and strong drink and was under the influence of both during his sojourn in this city. The defendant next purchased a ticket for San Francisco and the witnesses for the State have told you of the manner in which he traveled overland. He gathered crowds of passengers about him by telling Munchausen stories and attracted a good deal of attention by his manner of dressing. We will show the character of the defendant at his home and from the testimony of men who knew him from childhood that he is entirely incapable of such a crime. He makes no attempt at concealment, visits the barber shop and writes a prescription, goes to the shooting gallery, to Aloe's and to the trunk store. We will not try to prove that the man is a skilled physician, because such a thing could not be proven, and we will not excuse his attempt to operate on Mr. Preller.

We will show that a warm friendship existed between this defendant and Mr. Preller, and that this defendant is not the man to commit such a cowardly and treacherous murder for money. He lacks nerve, but is just hair-brained enough to attempt a serious

operation. These are the principal points, gentlemen. We have nothing to conceal; no sensational bomb to explode; no witnesses to keep shady.

We denounce as unfair the coroner's inquest and the attempt of the State to suppress the result of the post-mortem examination at the request of the coroner. If Dr. Nidelet had been called the defense would submit expert medical testimony to show that the indictment was false and that death was not the result of strangulation, as it asserted.

There is one other thing which I must refer to. I mean the McCulloch episode. In that plot, gentlemen, the State overshot the mark. It is cowardly; it is dastardly; it is infamous; it is entirely unworthy of belief; a man who would stoop to such a thing is not worthy of credit. We will show you that it is no more true than the insinuation that I and my partner are guilty of subornation of perjury. If I did not know that it was an outrageous, damnable, despicable plot, and that I and my partner cannot be reached by these black insinuations, I would not refer to it in this manner.

THE WITNESSES FOR THE DEFENSE.

THE PRISONER'S STORY.

Hugh M. Brooks. My name is Hugh M. Brooks; am twenty-five years of age; was born in Hyde, Chester, England. My parents are living there; studied law four years. Am a lawyer by profession, and have studied medicine and surgery at the collegiate school at Manchester; was on the scientific side, and the curriculum included chemistry, anatomy and similar studies; have studied medicine more or less ever since I left school; am very much interested in science, and keep up my studies as much as possible; have a diploma as a lawyer but not as a physician; practiced law nearly two years; first met Mr. Preller at the Northwestern Hotel, Liverpool, but did not really become acquainted with him until I met him on the Cephalonia. Our acquaintance ripened into a warm friendship. We talked about our plans and purposes. We landed in Boston, February 3d, and went to Young's Hotel. Mr. Preller went to Canada, and we corresponded. I contemplated settling in Boston; read a great many articles about New Zealand, and had a desire to go there; had frequently conversed with Mr. Preller about going there. We finally agreed to make the journey there together, to meet in St. Louis; had already occasionally prescribed for Preller as a physician; arrived at St. Louis 31st March, when Preller was to arrive from Canada and meet me; had \$50 or \$60 all told; was at the Southern Hotel two or three days before Preller's arrival. Previous to his coming had bought chloroform and bromide of potassium for my own use. I inhaled it, and put it in a hollow tooth I had, and have used it frequently since in jail; use it for pain, and use it also because I like it for its pleasant effects. First met Preller in St. Louis in the hotel corridor, on the Friday after my arrival;

was no more nervous when I registered at the Southern Hotel than I now am. The evening of his arrival Preller and myself went to Aloe's. I told them I had a fine set of lanterns, but that as we were going out to the far West we would have no use for them. I told him I had ten slides with me, and he said he would send one of his clerks for them and let me know what he would give for them. Preller and myself were inseparable, and I was in his room very much; invariably called at my room for me to go to breakfast with him. On Easter Sunday, before we went to Mellier's drug store, had a conversation with Preller about performing an operation on him. He described certain symptoms to me, and I concluded he was suffering from stricture. To relieve this I determined to pass the catheter. I read to him the chapter in Erichsen's "Science and Art of Surgery" relating to stricture and to chloroform.

Before our talk about the operation I went to Fernow's drug store to get some chloroform. I got four ounces and some absorbent cotton to plug an aching tooth. The chloroform purchased prior to that I used on myself. Was in Mellier's drug store when Mr. Preller made some purchases for the trip. He said we had better get what we want here, for we would probably not have another opportunity before we got to San Francisco. That was after I had discovered that the magic lantern had not arrived. He purchased there a sponge and some toilet requisites. Mr. Preller was to let me have the money for the trip, and I was to refund it when I sold my lanterns. He knew that I was not flush with money. I so wrote him. He offered to pay my expenses. I was entirely dependent upon the proceeds of the sale of the lanterns to pay expenses. The offer that Preller would advance me the money for the trip was made a considerable time before I found out that the lanterns had been detained. There was no specific arrangement, but he intimated in a general way, that if I was short of money he would supply what was wanted. I was not only to sell the lanterns, but what other valuable effects I had. Preller was certainly a most generous man. Remember the purchase of a box of cigars at the Southern. Mr. Preller said an Englishman did not like a green cigar, and asked for as dry a box as possible. We both looked at them, as I am a judge of a good cigar. The clerk said that if a box of green ones was kept for awhile they would become dry. Preller paid for the cigars, a box of fifty. He also paid for the articles I bought at Mellier's; asked there for a drink of bromide of potassium and valeriate of ammonia; the cigars purchased were taken to room 144 upon Preller's orders. I went to my room directly from the cigar stand; we had a smoke; Preller went to his room before the operation and returned shortly afterward; he had his coat and vest off and wore a long dressing gown; I then commenced the operation within ten minutes or a quarter of an hour. Mr. Preller took off his pants and drawers. Then he laid down upon the bed. I placed the four-ounce bottle of chloroform upon the washstand, where I had previously been engaged washing my instruments, and took out the

cork. I then poured about a fluid dram of the chloroform upon a piece of linen lint—that is to say, linen one side of which had been rubbed or furred up—replacing the bottle upon the stand. The lint I folded three thicknesses and held in my hands flat. Preller was lying upon the bed. I held the lint above his face, about six inches from the nostrils. I held it at that distance so that the vapor of the chloroform might be well mixed with the atmospheric air. I told him to breathe naturally, and the inhalation began. In a moment I turned to the bottle of chloroform, when I found that it had been upset and nearly emptied. In my opinion enough chloroform did not remain in the bottle to produce anaesthesia or unconsciousness to pain. I accordingly left Preller lying there and went down to Mr. Fernow's drug store to procure some more. I told him when he came what I wanted, and he said that two ounces was all that he could let me have, as he was very short of it just then. I took that and went out. Preller was still lying upon my bed; remember Mr. Fernow's testimony that I objected to the label being placed upon the bottle. What I recollect about that is that I told him it was not necessary to place a label upon the bottle, as I intended to empty the chloroform into the bottle I already had. I again saturated the lint with chloroform, and held it to his nostrils until I thought that a sufficient degree of unconsciousness had been reached. I then took the catheter, which I had previously warmed and greased, and proceeded to insert it. Upon that Mr. Preller made a peculiar noise as though the operation caused him pain. I at once came to the conclusion that he was not sufficiently unconscious and withdrew the instrument. I would like to say here that the urethra is the most sensitive portion of the human frame, and that in all operations on it a complete anaesthesia is recommended by the authorities. The eyes were opened, and I noticed that the pupils were still sensitive to the light. Upon that I poured about a dram and a half more of chloroform upon the lint, and held it again over his face. All the while I kept my fingers upon the pulse and watched the pupil of the eye. At no time did I hold the lint nearer than two or three inches of the nostrils. Suddenly I noticed that he began to breathe in a stentorous manner. I should say hard. He breathed hard and loud. I at once suspended the administration of the chloroform, and seizing either the straight or curved scissors—I forget now which—I cut off the shirt and undershirt. Then I took his arms by the elbows and raised and lowered them rapidly. That was to produce artificial respiration. I continued my efforts to revive my friend for upwards of half an hour. Very shortly after I began the heart's action ceased, the pulse stopped, and the mirror I held over his lips bore no stain. Still I could not bring myself to believe the worst, and in addition to the artificial respiration, I beat him over his naked back and shoulders with a wet towel and dashed cold water upon him. I then discovered that Preller was dead. I did not call for help because all my efforts were directed toward overcoming the evil effects of the chloroform. In such cases the loss of a few seconds sometimes

means the difference between life and death. I thought it best to employ every instant to resuscitation, dashing cold water, beating with wet cloths, working the arms, and all the usual methods, but I was finally convinced that he was dead. He was beyond all hope. He was past mortal aid. I scarcely knew what to do. My first impulse was to communicate with the authorities. Then I thought—here I am a stranger in a strange city. I knew no one. I was totally ignorant of the law that permitted a defendant to testify in his own behalf, but supposed that it was as it is in England, that he cannot go upon the stand. I was alone. I alone could explain it. I thought that the best thing I could do was to get away. I had a large zinc trunk in my room and I pulled it up to the bed. All my effects were in that and two or three valises. It would be impossible for me to describe my feelings. My only impulse was to get away. I emptied the trunk, and pulling it, as I said, to the side of the bed, I slipped in the body. I just pushed it off into the trunk, shut the lid and corded it. Then I went downstairs to the bar. I placed the drawers upon the body prior to putting Mr. Preller in the trunk; they were mine; they were too small for Preller and were put on with difficulty. I corded the trunk up with a rope; the stuff I took out of the trunk I left upon the floor. I went to the hotel bar. It is impossible, as I said, for me to describe my state of mind. I tried to drown my thoughts by drink. I took several glasses of brandy. I wandered aimlessly around the city until probably 9 or 10 o'clock. I have some recollection of visiting a shooting gallery. Then I came back to the hotel, and I believe I went into the dining room. Do not remember what took place there. Afterward I went to my room and stayed there all night; I was under the influence of liquor. Do not remember what I said in the shooting gallery. I would not undertake to connect myself with any statement after the sad occurrence. Sleep was an impossibility. In the morning I awoke and was even more mortified at my position. I then thought that the only thing I could do was to get away. Mr. Preller's pants were in the room, and I looked through them. I found a roll of bills—about \$500 in all, I think. I took them. I bought a ticket to San Francisco. What was the exact amount of the money? I can't say. I never counted it. The denominations of the bills were both large and small. I took the money and went out and bought two trunks. I bought them at a store close to the hotel. I saw the gentlemen who testified about my buying them, but I did not recognize them. One of the trunks was canvas-covered and the other was yellow. I had them sent to my room at the hotel. The clothing I flung into one. The under-clothing I cut from Preller was thrown in with the rest. I bought at the store besides the trunks a canvas-covered valise and two straps. I used the straps on the zinc trunk. The "traitor" placard, I wrote. I was considerably under the influence of liquor. I thought that the authorities would find it, and that it would puzzle them until the post-mortem or autopsy. My motive was to gain time to get away. I opened the trunk and

shaved his mustache off to conceal the identity of the corpse. I made the cut on the breast. I can't give you any reason for that. I went to the Union Depot with the canvas-covered trunk and valise and checked them to San Francisco. Then I wandered aimlessly about the city. I dropped into Mr. Aloe's and bought a pair of spectacles. I went again to get the spectacles, which they had to fix for me. At the second visit I purchased a pair of field-glasses and some little things. Remember going into the pawnshop, where I tried to pawn a watch and bought a diamond ring and a flute.

I was as yet undecided what to do. If I had known any attorney I would have gone to him and taken his advice, but I was all alone; I knew no one. The only person I could call a friend was my poor friend Preller. Do not remember going back to the shooting gallery. Remember being in the ordinary of the Southern Hotel. I ordered supper, but couldn't eat it. As to wine, I have no recollection as to that. I wouldn't like to swear positively. I was under the influence of liquor at the time. Did not say anything to Arlington. Did not display money at the dining rooms. Or a pistol. What I did in the ordinary is so mixed up in my mind that I wouldn't like to swear positively to anything concerning it. I had my beard shaved off at a shop between Fernow's and Hart & Duff's. Remember prescribing for the barber; he had a bad cold and I wrote him out a prescription. Remember getting shoes and a hat. At the time I administered the chloroform I had no intention of killing him. Preller had a private disease, but I treated him for stricture only. Under my treatment he was very much better, and rapidly recovering.

Cross-examined. I assumed the name of Maxwell the moment I left Hyde for America; was in the college at Manchester. I studied in the way of medicines and kindred science physiology, anatomy, acoustics, light and heat and chemistry. My parents were undecided as to the legal or medical profession; left that school in '77 or '78. I acquired enough to take several science and art diplomas in South Kensington. I never attended the Royal College of Physicians and Surgeons in London; did not ever get a diploma from that college or attend St. Bartholomew's Hospital, London. After I left college I acquired a knowledge of medicine through private reading and discussion. I, of course, met many medical students, and went with them occasionally to St. Bartholomew's Hospital. I had been practicing at Hyde for some time, and things were very bad, and I thought I would come West and do something for myself. My parents were opposed to my going. My father and mother are still living. I do not remember telling Mr. Warren that my father and mother and all relatives were dead, and that I was the last of my line; probably I did to Preller as to my past life and future prospects; little, if anything, I said about the past. We both discussed the future. I might have done so, but I am almost positive I did not tell Preller my name was Brooks. I did tell Preller I had received my degree of M. D. in one of my letters. It was in reply to a letter

in which he told me he had attended college at Heidelberg, and said it had given him a degree. I never attended Christ Church College, had never been Bachelor of Arts, Bachelor of Medicine, Master of Arts, and never got any degree from Christ Church College. I gave Preller to understand I had graduated in medicine; on board the *Cephalonia* I told him I studied medicine. In a letter he told me that if I was short of money he would raise the necessary funds. I told Preller I would be able to get money from friends in England. I was not in Italy at all; that was false. I wrote a letter to Mr. Warren from here April 7, 1885, saying, "We are going to a ranch in Texas." I want to say I was under the influence of liquor. I was drinking, or had been drinking, when I called Monday morning at the Hess & Culbertson pawnshop. I may have used Preller's money in buying a diamond ring. I had no \$100 bills of my own. I had only \$50 of my own. My friend's money paid for my purchases. I don't remember telling Mr. Arlington Sunday evening my friend had gone to the country for two or three days. I have no distinct recollection of what occurred at the shooting gallery; assumed the name of D'Auquier between St. Louis and San Francisco, and the French accent as well. This diploma from the College of Surgeons was done by me. My purpose in going to Hart & Duff's to get a hat was that I was afraid a silk hat would attract attention in the West. I did not tell Mr. Duff that I had been in the Egyptian army. I did what I thought was best to cover up my tracks and get away. The liquor I drank made me do a great many things that I would not have done if I had been sober. I know what a stricture is. It is a swelling of the membrane around the inside of the urethra. I know how they are classified. I once operated upon a case of stricture at Hyde. It was in 1884. I treated Preller in the East for a private disease, or rather the consequences of a private habit. Upon our arrival in Boston I began treating him. I threw my catheters in the Pacific Ocean, being disgusted. I can't say that I was drunk. I can say I was in an eccentric state. The exact character of the stricture that Preller was suffering I had never located, but believe it to be near the prostrate gland. I do not know if I closed the shutters before Preller laid down or locked the door before I began the operation. When I went for more chloroform he was conscious, I believe; I know he was; pulled the cover over him and went out. I think I told him I had some more chloroform. Then I pulled down the bed clothes and began the operation. Had not begun the operation until I administered some more chloroform. I made several applications—I don't know how many. I don't remember exactly how much I used, or whether I entirely exhausted the contents of the small bottle. I cut off the mustache because I had decided upon flight, and I thought if I could throw off the authorities it would give me time to get away. I opened the trunk to put in the placard. I never said I received a letter from Preller stating he would pay my expenses to Auckland. I said that he wrote me telling me that if I were short of funds he would advance

some to me. I lost this. I admit I wrote him I had some property in England tied up in chancery, but was afraid after the lawyers got through there would be none left. What I referred to was that a lawyer owed me a fee for work I had done for him and he could not pay me any as he was hard up.

Mr. Clover. Can you tell me now, Mr. Brooks, how it is you have lost all the evidence that would prove your innocence, and retained only that which would prove your guilt? I don't know that I have done so.

John I. Martin. Am one of the defendant's attorneys and partner of Mr. Fauntleroy; the letters from and to the alleged Mr. Mann were received and written by me; my partner was engaged in other work at the time and knew nothing about it. I tried to meet the men as I did in numerous cases like this; we were daily receiving letters from people who said they knew something about the case; that they knew who the real murderer was. One man wrote, I recollect, that he could prove that a dead body had been carried into the Southern after Brooks left. This was the reason I noticed the Mann suggestion.

May 28.

Dr. Louis Bauer. Am a physician and surgeon in my 73d year; was educated and practiced 10 years in Germany. In 1849 was a member of the Prussian House of Representatives, but, taking part in the revolution, had to flee to England; remained there until 1856, when I came to America; practiced in New York until '69, when I came to St. Louis; am now dean of the St. Louis College of Physicians and Surgeons; am acquainted with the medical features of this case by reading the evidence and attending the trial. The administration of chloroform is a very nice art, requiring ex-

tra precautions. These things are necessary: First, to procure a good article; the second rule is to examine the patient carefully to find out whether he is in a physical condition that might be objectionable to the control of chloroform. A third point is how to administer chloroform. It contains no oxygen in its composition and therefore no person can live on chloroform two minutes. It must be given together with a good volume of atmospheric air. That is the third precaution. There is a fourth. After you have produced certain effects you must stop and don't go beyond them. The line of demarkation is this: when the voluntary action of the heart stops and life depends entirely on the sucking action of the diaphragm, that is the utmost limit of its usefulness. Then comes the danger, and one step and two or three more inhalations might produce the most serious effects. Those are the chief things. And therefore it is necessary that we place the administration of chloroform in the hands of a man who is properly skilled and trained for its use and who pays no attention to anything else but the physiological effects of chloroform. It is a very rare case that a surgeon takes the responsibility to apply the chloroform himself and performs an

operation at the same time. I might state, sir, I have used chloroform very frequently, thousands of times, and I have never lost a patient, being threatened about eight or nine times.

Mr. Fauntleroy. State whether it is customary or usual to use chloroform in the treatment of strictures? Some may use it, but I hardly think it is customary; I never use it except where some painful operation is connected with the removal of the stricture. If I should, for instance, look to divide the stricture within or from the outside of the urethra I might give chloroform, but the mere introduction of a staff I don't think requires chloroform at all, and very few surgeons—I don't think there is any—would use chloroform under such circumstances. The sentimental ones—the young ones—they may.

Mr. Fauntleroy. What would be the proper steps to take if in administering chloroform you saw the danger line reached, if you saw symptoms of approaching death, what steps would you take to prevent it? First to lower the head and to give as much fresh air to the patient as I could. Secondly, to use his arms up and down, press them to the side of his chest. Thirdly, to press the air out of his lungs so as to force the air in so that the air being pressed out, new air rushes in by itself. Those are the chief three things. Then we use, if we have it prepared, if we have it handy, we use electricity.

May 29.

The *defense* read a number of depositions taken in England under a commission issued to J. H. Brooks, of Hyde, Chester Co., a Commissioner of the Supreme Court of Judicature. The persons sworn were acquaintances of the prisoner before he left England, viz.: Geo. F. Bowden, auctioneer; Wm. B. Orton, chemist; Richard S. Brown, solicitor; Thos C. Leah, musician; Joseph Hopwood, grocer; Geo. Burrows, accountant; Joshua Oldham, confectioner; James B. Ledsham, publisher; Wm. Boardman, accountant; Alfred Nicholson, draper; Henry Woodall, schoolmaster; Samuel Coburn, auctioneer, and Henry Middleton, draper.

All of them testified that they were well acquainted with the prisoner from his childhood; that his reputation in the community was that of a peaceable, quiet and law-abiding citizen, of gentle disposition and loyal to his friends, honest and straightforward in business matters and truthful. They never heard his character discussed before he left England, at which time he was a solicitor, practicing at Hyde; never heard of his going by the name of Maxwell or D'Auguier or Teufik, or of his practicing medicine; never heard of his being deeply involved in debt or of his forging his father's name, or that he left the country to escape prosecution for appropriating money of clients; never heard of Mr. C. Arthur Preller or heard prisoner say he was going to America.

Mr. Fauntleroy. I wish to call the attention of the Court to the fact that the State has, without notice to the defendant, caused the

body of Preller to be exhumed, and request the prosecution that sometime during the day the defense be allowed to use this evidence and to have experts examine the body.

Mr. Clover. The body of Preller has been exhumed and the parts removed from it have been intrusted to eminent surgeons for examination, and the State expects to offer the result of that examination in evidence by way of rebuttal, and for that reason declines compliance with the request.

JUDGE VAN WAGONER. Of course, the Court knows nothing of this matter, and I can only say the way it strikes the Court now: If such testimony as that is presented in rebuttal the Court will give you all the facilities in reason that it can in order to get experts if you desire to examine and look into it. At present, I must simply look at the evidence as it is presented. If you are taken by surprise at that time, why, the Court will endeavor to assist you as far as it can, and give you sufficient time to examine it. That is the best I can do for you now.

Mr. Fauntleroy. The law requires that such examination shall only be made by the State on due notice to the defendant.

The COURT. I will hear you on that when you produce your authorities. When this matter comes up I will pass on it. It would not be proper for me to comment on anything because there is nothing before me.

Mr. Fauntleroy. The State declines that request—refuses it. Now we ask that the Court make an order that we be permitted by experts to examine the parts.

The COURT. I cannot do so at present. I don't know what I may do on Monday.

May 31.

John F. Ryan (recalled). As superintendent of the morgue I went to Bellefontaine Cemetery a week ago last Friday with the Circuit Attorney and Drs. Prewitt and Nidelet. We opened Mr. Preller's coffin and found the body much as it was when I saw it last. The urinary parts were removed and afterwards delivered to Dr. Brokaw.

Dr. T. F. Prewitt. Have practiced in this city 30 years; am Professor of Principles and Practice of Surgery in the Missouri Medical College; also its dean; was present at the exhumation of the body as described by last witness.

Mr. Fauntleroy. We object because this was done without the knowledge of the defendant's counsel. There was no one there representing him.

Mr. Bishop. Nobody represented the State at the time the deceased was killed or when he was put in the trunk, so that is a stand off.

The COURT. The objection is overruled.

Dr. Prewitt. After the body was taken up and it was found in a good state of preservation, no signs of decomposition, the genital organs were removed entire, and in conjunction with Drs. Nidelet and Brokaw, were

examined. We found the mucus membrane in a healthy condition, free from any indication of inflammatory lesions; the person must have died while these organs were in a healthy condition. There was not the slightest evidence that he was at the time of his death suffering from anything like stricture.

Dr. James C. Nidelet. a phy-

Mr. Clover. We close the case here.

Mr. Fauntleroy. We now ask that we be permitted, through experts, to examine these parts that have been referred to in this matter.

Mr. Clover. Whom do you want to submit them to?

Mr. Fauntleroy. To Dr. Bauer and others.

Mr. Clover. I am willing to submit them to any reputable physician in the city of St. Louis, but I don't wish to submit them to Dr. Bauer; not because I question his reputability, but because he is assisting the defense and has suggested questions to counsel when medical experts were on the stand, but if they say they will submit them to Dr. Gregory, president of the American Association of Physicians and Surgeons, to Dr. Mudd or to Dr. Timelake, or any other physician, they can have ample opportunity to do it.

Mr. Fauntleroy. Without furnishing the names of any physicians we ask that they submit these parts to the inspection of Dr. Bauer and such other reputable physicians as we may see fit.

The COURT. There is the circuit attorney. They are not before the Court and have never been before the Court.

Mr. Fauntleroy. I understand that that request is to be complied with.

Mr. Clover. I have nothing to say, Mr. Fauntleroy.

Mr. Fauntleroy. If the state, your Honor, takes that attitude we close the case here.

THE INSTRUCTIONS OF THE COURT.

JUDGE VAN WAGONER: The Court instructs the jury that if they believe and find from the evidence in the cause that at the city of St. Louis and State of Missouri, the defendant, Hugh Mottram Brooks, alias W. H. Maxwell, alias Walter H. Lennox-Maxwell, M. D., alias Theodore Cecil D'Auguier, did, on the fifth day of April, A. D. 1885, or at any time prior to the finding of this indictment, kill and murder one Charles Arthur Preller in the manner and form charged in either of the counts of this indictment, they should find the defendant guilty of murder in the first degree.

If the jury find the defendant guilty of murder in the first degree they will simply so state in their verdict.

The Court instructs the jury that by the term "feloniously" is meant wickedly and against the admonition of the law, that is, wickedly and unlawfully. By the term "wilfully" is meant intentionally and not by accident. By the term "deliberately" is meant done in a cool state of blood. By the term "premeditatively" is meant thought of beforehand, for any length of time however short. The term "malice" as used in this indictment does not mean in the legal sense mere spite, ill-will, hatred or dislike as it is ordinarily understood, but it means that condition of mind which prompts one person to take the life of another person without just cause or justification and signifies the state of disposition which shows a heart regardless of social duty and fatally bent on mischief. And "malice aforethought" means that the act was done with malice and premeditation.

The Court instructs the jury that if they believe and find from the evidence and find that at the city of St. Louis and State of Missouri and within three years prior to the finding of this indictment the defendant undertook to treat or operate upon the said Charles Arthur Preller for a disease and did administer to the said Charles Arthur Preller a certain deadly poison, namely chloroform, so negligently, carelessly and recklessly that the said Charles Arthur Preller then and there died from the effects of said chloroform so administered by defendant but without any intent on the part of the defendant to kill or do bodily harm to said Charles Arthur Preller, then the jury should find the defendant guilty of manslaughter in the fourth degree and assess his punishment at imprisonment in the penitentiary for a term of two years or by imprisonment in the city jail for not less than six months or by a fine of not less than one hundred dollars and imprisonment in the city jail not less than three months.

The Court further instructs the jury that if they believe and find from the evidence that the defendant was attempting to treat the said Charles Arthur Preller for some disease and that in such treatment the defendant did, with the consent of the said Charles Arthur Preller administer chloroform to the said Charles Arthur Preller and that the defendant did administer such chloroform to the said Charles Arthur Preller in a careful, prudent and cautious manner in the treatment of such disease and that the said Charles Arthur Preller then and there died from the effects of said chloroform so administered by the defendant then the jury should acquit the defendant.

The Court further instructs the jury that the intent with which an act is done may be proved by direct and positive evidence or it may be inferred from all the facts and circumstances surrounding and attending the act, and must be determined by the jury from the evidence given in this case.

The jury are instructed that they may from circumstantial evi-

dence alone find the defendant guilty when the facts established are inconsistent with any other theory than that of his guilt; but in order to find the defendant guilty upon circumstantial evidence alone the facts proved must be wholly inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

The Court further instructs the jury that if they believe and find from the evidence that the defendant made any statement or statements in relation to the homicide charged by this indictment after said homicide is alleged to have been committed the jury must consider such statements or statements altogether.

The defendant is entitled to the benefit of what he said for himself if true and the state is entitled to the benefit of anything he said against himself in any statement or statements proved by the state.

What the defendant said against himself the law presumes to be true because said against himself. What the defendant said for himself the jury are not bound to believe because it was said in a statement or statements proved by the state, but the jury may believe or disbelieve it as it is shown to be true or false by the evidence in this cause; it is for the jury to consider under all the circumstances how much of the whole statement or statements of the defendant proved by the state, the jury, from the evidence in this cause deem worthy of belief.

The opinions of the experts who have testified in this cause is testimony which the jury should consider and examine in connection with all the other testimony in this cause, subject to the same rules of credit or disbelief as the testimony of other witnesses. The opinions neither establish nor tend to establish the truth of the facts upon which they are based; neither are the hypothetical questions put to these experts by the counsel in the cause evidence of the truth of the matters stated in these questions.

Whether the matter testified to by the witnesses in this cause as facts is true or false is to be determined by the jury alone.

Flight raises the presumption of guilt, and if the jury believe and find from the evidence that the defendant after the commission of the homicide alleged in this indictment, fled from the State of Missouri and tried to avoid arrest and trial for said offense they may take this fact into consideration in determining his guilt or innocence.

The Court instructs the jury that although they may believe and find from the evidence that the defendant fled from the State of Missouri after the commission of the homicide alleged in this indictment, yet, if they believe and find from the evidence that he did not flee from a motive to avoid arrest and trial on this charge they should not consider it as an element in arriving at their verdict as to the defendant's guilt or innocence as to this charge.

The previous good character of the defendant if proved to your reasonable satisfaction is a fact in the case which you ought to con-

sider in passing upon the question of his guilt or innocence of this charge, for the law presumes that a man whose character is good is less likely to commit a crime than one whose character is not good.

But if all the evidence in the case including that which has been given touching the previous good character of the defendant, shows him to be guilty of the charge, then his previous good character cannot justify, excuse, palliate, or mitigate the offense.

The Court instructs the jury that the defendant is a competent witness in his own behalf but the fact that he is a witness testifying in his own behalf may be considered by the jury in determining the credibility of his testimony.

The jury are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility, weight and value, the jury should take into consideration the character of the witness, his or her manner on the witness stand, his or her interest, if any, in the result, his or her relation to, or feelings for or against the defendant or deceased, the probability or improbability of his or her statement, as well as of all the facts and circumstances given in evidence in this cause.

And in this connection you are instructed that if you shall believe from the evidence that any witness or witnesses have wilfully testified falsely to any material fact in this cause, you are at liberty to disregard the whole or any portion of any such witness or witnesses testimony.

The law presumes the defendant to be innocent, and this presumption continues until it has been overcome by proof which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests upon the State. When this presumption has been overcome and when the guilt of the defendant has thus been made clearly to appear, your duty is to convict him, but if by the evidence you are not convinced of his guilt beyond a reasonable doubt, your duty is to acquit him. By the term "convinced beyond a reasonable doubt" is meant convinced to a moral certainty. But to authorize an acquittal on the ground of reasonable doubt alone, such doubt should be a substantial doubt arising out of the evidence in the cause and not a mere possibility that the defendant is innocent.

You will now, gentlemen of the jury, listen to the arguments of counsel, who will endeavor to aid you to reach a proper verdict in this cause, by refreshing in your minds the evidence which has been given to you in this cause and by showing the application thereof to the law; but whatever counsel may say you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be, and by the law as given in these instructions and render such verdict as, in your conscience and reason and candid judgment, seems to be just and proper.

June 1.

THE SPEECHES TO THE JURY.

Mr. Bishop said he did not expect to become eloquent, as the facts in the case were eloquent enough to appeal to the candid judgment and enlightened opinion of every man. It was usually the custom in the opening argument for the prosecution to outline its theory. In the present case the prosecution had no theory, if any theorizing had to be done it would have to be done by the defense or the jury. Of the credibility of the witnesses the jurors were the sole judges. The defendant was a competent witness in his own behalf, and the jurors were the sole judges of his credibility, but the fact that he was testifying in his own behalf should be taken into consideration. The fact that the defendant took to flight was a circumstance that should not be overlooked. His previous good character was also to be considered, but it would cut very little figure in the case.

Mr. Fauntleroy told you gentlemen, when he rose to make his opening address that the state could not put in issue defendant's character, that the defendant could only put it in issue himself, and, he said he would "fling down the gauntlet" to the state. When we took up the gauntlet, gentlemen, you remember how hard he fought to keep the evidence of character out. In proof of the defendant's character there is introduced here a number of depositions taken in England. It is a privilege of the defendant to take depositions in any part of the world. Who are these men whose depositions are here? We do not know them. Are they former associates of this man? They say not. Why didn't the men he studied medicine with, and the young men he associated with give us their testimony? These witnesses never speak after January, 1885, when the defendant left England. From that time he has been a forger, a thief and an impostor.

Mr. Fauntleroy objected to the term "forger," as the offense had not been proven.

Mr. Bishop (producing the bogus diploma). There is the proof of my words, now to the facts: Here is a man found

dead in the Southern hotel under the most horrible circumstances. The body, reeking and branded, is found rotting in a trunk. For two or three days it was a puzzle, and then, by the aid of the police and the telegraph the murderer was traced out on the Pacific ocean. He never dreamed there was a telegraph line that ran around the world the other way. When the vessel he trod so proudly reached Auckland he was taken in charge by two officers and held until we got him back. You have seen how nice the evidence dovetailed here, but you cannot realize the money and time that has been spent securing the truth in this case.

Mr. Preller was a man of an exalted character, a reserved, religious young man, and if there is anything that adds infamy to the crime it is the branding of the victim as a traitor, robbing him of his money and slandering his good name. What think you will be the feelings of that family in far away England when they read of the infamous defense set up in this case, of the slanders necessary to bring in, in the hope of saving a neck. A great deal has been said of "a stranger in a strange land" and this "poor boy" Brooks. True Mr. Preller had been in this country before and was contemplating a trip to Auckland when he was murdered. The generosity and manliness of Preller's character is shown by the manner in which he took this man up and aided him. The only bond between them was nativity. This defendant, this graduate of Christ Church college and Royal College of Surgeons, this pasha of two tails represents himself to Mr. Preller as a man of means. He expects money, but manages not to get it and sticks to Preller. He learns of Preller's contemplated trip to Auckland and makes up his mind to go with him. He tells Mr. Preller that he received a cablegram which informed him that his property was tied up in chancery proceedings and he didn't expect to get any money now, that the lawyers had possession of it. He explains that on the stand by saying that some London parties owed him a fee that he was trying to get. He follows Preller about, and by lies and misrepresentations secures his friendship.

Maxwell had reached such a point in Boston that he could stay there no longer. He had told Warren that he was the last of his line; let us hope to God he is; and that he expected to inherit a large property, but when it was settled up there was nothing. He didn't know what to do. Finally, as he did not take Boston by storm, he made up his mind to leave. He represents to Preller that by the sale of a magic lantern and other effects he can pay his way to Auckland. Finally they meet at the Southern. Preller was well fixed. Maxwell had nothing. The magic lantern had been detained en route, and he found himself in the city, after the arrival of his friend, without a cent, and with the prospect of being branded as a beat and a swindler staring him in the face. Then it was that the demon avarice took possession of him and he resolved to murder his friend. He had already visited the drug store several times and, by representing himself as a physician, secured large quantities of chloroform. Then he carries out his murderous plot.

He tells you the death was an accident; that crazed with grief he wandered aimlessly about the city. Let us see how aimlessly he wandered. Before Mr. Preller arrived he had wandered into Mr. Hess' pawnshop and tried to pawn a lot of bogus jewelry for \$25. He must have \$25 or nothing. This, the man who said he had \$50 or \$60 when he arrived. Suddenly the day after the murder, he looms up as a man of vast means. He arises early and goes to the trunk store. He does not take the first trunk he sees; not finding any to suit his liking in the store, he goes back in the shop and picks out one. That does not look like aimlessness. Then he buys straps for it; that does not look like grief. Then he goes and buys a flute; his soul is filled with music. He doesn't buy the first one put into his hands. He selects one and tries it. Does that look like grief? Then he buys a diamond ring, adorning his person with his deceased friend's money. Was he crazed with grief then? During his trip to the Pacific, he had a jolly time. Look at his conduct in San Francisco: did that show his grief?

Mr. Bishop referred to the disguises of the prisoner and his attempt to evade arrest, and closed by an appeal to the jury to do their duty without fear or favor.

Mr. Fauntleroy analyzed the feelings which were uppermost in his mind, and outlined the great responsibility which rested upon himself and the jury. He would rather be the defendant than one of the jurors. The worst that could befall the defendant was the forfeiture of his life, but the juror if he felt that he had not acted right, will be pursued for life by the phantom of his mistake. Poor Arthur Preller, and I shall possibly be ridiculed by the state for thus speaking of Mr. Preller, poor Arthur Preller is dead. His spirit has flown to its Maker. There is one mother's heart broken, one father's head bowed, and one form missing from the magic home circle. Now gentlemen, it devolves upon you to say whether another mother's heart shall be broken; whether another father's head shall be bowed, the responsibility, the awful responsibility, rests on you. The state has told you that you have nothing to do with the hanging, that if you bring in the verdict of guilty the hanging will take care of itself. Ah, gentlemen, you must not be blinded by these sophistries. The responsibility is with you. If, gentlemen, after this case is closed, each and every one of you believe that this defendant is guilty beyond a reasonable doubt, then as citizens of Missouri we say to you it is your duty to convict. To disinterested minds this is acknowledged to be the most difficult case to determine. To the detective mind, to which everything has a guilty look, this case presents nothing but evidences of guilt. Such is the position of the state. This defendant is not guilty of the coldblooded atrocious crime with which he is charged. He has not besmirched nor befouled the character of Mr. Preller. *Mr. Bishop* said he would prove he had, but he didn't, he assumed that such was the fact and then went on talking. If this boy is guilty of the atrocious crime charged I say he should be hung ten times and he ought to have ten necks to be broken instead of one. Our view of this case is that it was accidental death.

You remember the words of the circuit attorney in this case, "You need not expect any help from me." These words are unparalleled in a court of justice. It is not the duty of the counsel for the state to go on the assumption that the defendant is a criminal who should be summarily executed. The supreme court says that it is the duty of the state officers to protect the rights of the defendant, and this they have refused to do and we have a right to comment on their action. Mr. Bishop has told you that the only question in this case was whether the defendant was guilty of murder in the first degree. Now that is not so. His honor has told you that if from certain facts you arrive at a certain determination then you shall return a verdict of manslaughter. If you arrive at another determination then you shall acquit the defendant. Mr. Bishop wholly ignored these issues. He says "circumstantial evidence is the strongest kind of evidence, and lawyers so recognize it." It is true many men have been convicted on circumstantial evidence, but think of the thousand who have been convicted on perjured testimony. I believe, gentlemen, that you will see to it that this man is not added to the thousands already convicted on perjured testimony. We will show that there has been perjured testimony here, but will give the state the benefit of the doubt and say they did not know it was perjury. What do you think of the proposition laid down by the state, that previous good character counts for nothing. That is refreshing, isn't it? You, gentlemen, who have spent the greater portion of your lives keeping your character above reproach, appear to have wasted you time. The character which we have proven for this young man is absolutely inconsistent with the theory of the state in their case.

Mr. Fauntleroy defended the character of the witnesses whose depositions were taken in England. He denounced the insinuations of the state, and showed that the representatives of the commonwealth had been duly informed of the proposed plan to take the depositions, and if they desired to investigate the character of the witnesses, they had every opportunity to

do so. Maxwell was then a foolish, self-conceited boy, coming to this country to practice medicine. He was under the impression that America was a land of barbarians, and that although he was not good enough lawyer for England, he believed he was good enough doctor for America. He adopted a high-sounding name and told boyish stories about himself, and exhibited his instruments and his books to Mr. Warren with boyish delight. He did not represent himself to Mr. Preller as a man of means. In his letter he told him that he had just \$100 but hoped by the sale of his slides and magic lantern to secure some \$200 or more. He had treated Preller in Boston, prescribed for him and it was natural that he should do so in St. Louis. Preller was a man of the world, a man who had travelled around the world and who had worldly experience. It was not possible that such a man could be hoodwinked by a foolish boy.

The fact that the defendant attempted to sell his magic lantern and went around accompanied by Preller for that purpose, shows there was no plot. That fact was enough to create a reasonable doubt. We then plead for mercy for our client. Death by the rope was the most horrible of all deaths, the most dishonorable and five times more terrible than Preller's death. The scene in Mellier's drug store Sunday afternoon is the most significant fact in the case. It is like a voice from the grave coming to show this boy's innocence. It shows that Mr. Preller at that time, one hour before his death, still contemplated the trip to Auckland with this defendant.

Mr. Fauntleroy then described the character of the friendship that existed between the men, quoted the evidence on that point and held that such a state of things was inconsistent with murder.

June 2.

Mr. Fauntleroy exhibited the shirt cut from the body of Preller, and pointing to the blood-stain, said it corroborated the evidence of the defendant. It was a most significant fact and one which the defense relied on for a favorable verdict.

The character of Preller was dissected, and the speaker held that all of the evidence showed that he was addicted to the disgraceful habit alleged by the defendant. His reserved demeanor, his refusal to associate with women, corroborated this view of him. It was just such characters that supported quacks and would allow such a man as the defendant to operate on him. Why the defendant did not summon help was a conundrum that only God could answer. No one knows what another will do under like circumstances.

Detective McCullough said that Maxwell told him he killed Preller for meanness. The motive shown by the state was robbery, and not meanness. Now, gentlemen, couldn't he have easily robbed Preller without murdering him. Here was Preller carrying his money in a large roll in his pocket, sleeping with the defendant and associating with him on terms of the closest intimacy. This shows the motive relied upon by the state is not to be relied upon by the jury. As to the evidence of Harry Arlington it is not to be believed. The witness had appeared before the coroner, but had forgotten to state this most important matter, that Maxwell exhibited a roll of money in the dining-room of the Southern hotel Sunday night and asked if a man killed another could get off with \$500 or \$600. His excuse was that he had forgotten it until his memory was refreshed by another witness. It was impossible for a man to forget such a fact. The testimony of Mr. Frazer, that among other things he recognized Preller by the color of his eyes five months after death, was a mistake or worse. It was impossible, notwithstanding the wonderful effects of the oriental embalming fluid, to truthfully say such was the fact.

The testimony of Dr. Prewitt that the body of Preller was not decomposed at all was a mistake. Decomposition begins with death and as the body was not found until nine days after death, it was, as the coroner expressed it, in an advanced state of decomposition. The testimony of Dr. J. C. Nidelet contained the most important fact of the many that

the state has unknowingly placed in the hands of the defendant. Dr. Nidelet testified that he examined the portions of Preller's body exhumed on the 21st and that although there was no sign of stricture, found a rupture that might have been caused by the insertion of an instrument. The action of the state in suppressing the result of post-mortem examination we denounce. If it had been submitted it would be in conflict with the state's theory of the case. The state's representatives were not satisfied with their case. They did not like to go before a jury with the facts. What must be done? Then the detective instinct of Mr. McDonald came to the rescue. He went to Furlong. Oh! blessed be the name of Furlong. I wish I could describe to you, gentlemen, the feeling, the loathing, the horror and detestation which possessed me when I learned of the McCullough trick. I don't mean to be personal in this argument, but I will be responsible to any of of the gentlemen after the case is submitted. The state's representatives were guilty of the most monstrous outrage in the annals of criminal jurisprudence. The grand jury were hoodwinked, the examining magistrate was deceived and the judge of the criminal court fooled—all through the connivance of the assistant circuit attorney, whose duty it is to see that the defendant receives a fair trial. The alleged confession obtained by McCullough we denounce in the most scathing terms. If a verdict of guilty was returned against the defendant, it would encourage such methods, and no man was safe. The jury should set the seal of their condemnation on such work. It was not the state of Missouri against Hugh M. Brooks, but Furlong and McDonald against Brooks. A man who admitted that he would lie without limit in every place except on the witness stand was not calculated to impress one with his veracity on the stand. The defendant did not stake his life on the allegation that Preller had stricture. Many physicians had made a wrong diagnosis.

Mr. McDonald. After the argument of my friend Fauntleroy it would seem proper for me to apologize for my appearance in this case. But I shall not. I am an officer of the state

of Missouri and propose to do all in my power to enforce the laws and see that justice is meted out to all who violate it. That is why I am in this case, though I don't feel that my poor abilities are commensurate with the great responsibility upon me. I can understand, gentlemen, how tired and wearied you are, and it seems to me the counsel should not have consumed so much time in discussing issues foreign to the case. Mr. Fauntleroy has spoken at length, and it is now my duty to go over the same ground and point out the facts that he has overlooked and eradicate the sentiments and prejudices which he has aroused in your mind. He appealed to all the sympathies and passions in the human mind, and I want you to discard them and come back to a cool deliberation of the facts. If after a cool deliberation of the case, you come to the conclusion that there is a reasonable doubt in this matter, I say it is your duty to acquit him. The counsel has pictured me as seeking the blood of the "school boy" as they call him; that I am trying to convict him on perjured testimony, but such is not the fact. The counsel don't believe it, and when this case is over, they will shake me by the hand as they have often done before. They say I am a cold, relentless prosecutor. Suppose I am. What does the public want of the prosecutor? Isn't it his duty to prosecute with all his power, especially in case of foul and loathsome murder as this is? I listened to the counsel's argument, to the many remarks he made outside of the evidence, to his illustrations that were foreign to the subject, and I propose to answer them in the order they were made. About the first statement he made was that the responsibility which rested on the juror was not confined to the defendant alone, but involved his family. That was not right. Is it right, after all the infamy this boy has heaped on his parents, to drag them before you? It was done to create a sentiment in your breast for the defendant. It was a shield to turn away the sharp points of this evidence. Such things have no place in a court of justice. Leave that mother just where this boy left her when he started out in the world an adventurer. We must take this

young man just as we find him. We can't go back to his parents. We can trace him from the moment he comes to us until he packs that body in that trunk. Your attention must be given to the room and the body and the trunk. Mr. Fauntleroy pictures to you the consequences of a mistake on your part. We will present the facts in this case to you in such a manner that no room will be left for a mistake. I saw with what adroitness he presented to you his definition of a reasonable doubt. After melting your hearts with a little sentiment, he proceeds to hammer down your throat this proposition of a reasonable doubt. Now, the law doesn't require the unerring judgment he pictured to you. Not only must you have a doubt, but a reasonable one, which means that your doubt must be based on reason. He next speaks of some harsh words used by Mr. Clover. What Mr. Clover meant was that he did not propose to go on the other side of the table and defend the prisoner. He is sworn to prosecute. They made a great flurry for five or six days before Dr. Nidlet was introduced and claimed the state was trying to suppress something. When Dr. Nidelet was put upon the stand they had no questions to ask him. You see they were not sincere. They cited the fact that the defendant tried to settle down in Boston and practice medicine as an indication of a boyish freak. You will remember that the defendant wanted the best of everything; no second class for him. He went to Boston in order to get into the best society. The "dirty pigs, the Irish and Germans," as he calls them, had no fascination for him. When he came to St. Louis he was almost broke, but he wanted the best and took a room in the floor above the parlor. When Mr. Preller, a flourishing young business man with plenty of money arrived, he took a modest room on the fifth floor. This indicates the difference between the men. The counsel spoke of the adoption of the name of Maxwell as a boyish freak. What was the matter with Hugh M. Brooks? Why did he drop that name? Did he commit some offense? Why did he adopt the name Tewfik or Theodore Cecil D'Auquier? It has been held out to you that he was a school

boy. Was it like a school boy to take one of the best rooms in the Southern hotel, and when his friend arrives undertake an operation that only a skillful physician could do at the best? Was it like a school boy when he believed his friend was dead to get a mirror and hold it against his nostrils to see if the breath had left the body? Could a man crazed with grief and excitement calmly take a mirror and hold it against the mouth of his friend and to learn if life was extinct? Was it like a school boy to drag this horrible receptacle to the bed and tumble the body of his friend into it? Was it like a school boy to jam the head of that dead friend under that cleat in the trunk? Was it like a school boy to crush the limbs down in the manner the evidence shows? Then was it like a school boy the next morning to coolly open that trunk and take his scalpel and cut a cross on the breast of his dead friend, to cut off the mustache, brand it with the infamous placard and then leave it there to reek and to rot? Was it like a school boy to take that dead friend's money and not leave enough to pay his funeral expenses?

Mr. McDonald described the manner in which Maxwell left England, the meeting at the Northwestern hotel, Liverpool, and the career of imposition and fraud which the prisoner is alleged to have practiced. How by fraud and lies he worked on the sentiments of Preller until he took him into his confidence. The career of Maxwell in Boston, his lies and deceptions were pictured and finally the meeting in St. Louis.

The murder was the result of a deep scheme. The prisoner as soon as he arrived in the city visited Fernow's drug store. He visited it every day, and told Mr. Fernow that he expected a friend from Canada. He did not bring that friend around. The prisoner supposed that when the corpse was found in room 144 that Fernow would come to the front that it was that of Dr. Maxwell, as Maxwell had told him the number of his room. This defendant hoped to be dead to the world after the tragedy in room 144. Neither Maxwell nor Brooks was heard of after. No, Tewfik and D'Auquier came to the surface then. He thought that the authorities would believe

that it was the corpse of Walter H. Lennox-Maxwell, M. D., that was rotting in that trunk. The prisoner says that he had an understanding with Preller about the Auckland trip before they came to St. Louis. If he did then let me read you something.

Mr. M'Donald read a letter from Maxwell to Preller in which the former said he was contemplating a trip to New Zealand and had written to London for money.

If he had an understanding with Mr. Preller and that Mr. Preller should pay his expenses, how does he explain that? When examined, his counsel wanted him to say he had the understanding with Preller after arriving in St. Louis, but the prisoner made a fatal mistake, and his words are contradicted by his letters.

June 3.

Mr. McDonald referred to the depositions in England in behalf of the prisoner. If the state had an opportunity to put the witnesses on the stand something more tangible regarding Brooks' character might be elicited. An examination might show why he left England in such a sudden manner, and how he came to take the lanterns with him. The statement by the prisoner that he and Preller had an understanding in Boston about the Auckland trip was false. (A letter written by the defendant February 20, to Preller was read in which Maxwell said: "I am looking out for a position as surgeon on some steamer going to Liverpool.") If there had been an understanding, this would never have been written. (The other letter of a later date in which he told Preller that he was contemplating a trip to New Zealand, and had written to London for money was again referred to.) When he arrived in St. Louis he was not certain that he was going to Auckland. He asked Mr. Fernow if St. Louis wasn't a good place to settle in, and was told that the downtown streets were filled with physician's offices, but that the residence district offered a good field. This shows that he was undecided. Preller firmly believed that Maxwell would sell the lanterns and thus secure money enough to pay his expenses to Auckland. Saturday

they went together to the depot and learned that the lanterns had been detained at Port Huron.

This information was a great disappointment to Maxwell. He felt that his last hope was gone and he resolved to execute the plot he had been forming for some weeks. The following Sunday afternoon he killed Preller by first injecting morphine into his arm and then chloroforming him. While the body was still warm it was rifled and placed in the trunk, where the murderous work was completed. The defendant had sworn that he did not take Preller's money until the following morning, yet two unimpeachable witnesses for the state made oath that they saw a large roll of money in the possession of Maxwell the night of the murder.

He took a pair of scissors found with the clothes and cut the underclothes off. Would a man anxious to resuscitate a dead friend go about it in that manner? Would he not have torn the clothes off in a second instead of consuming minutes in cutting them off. He had said that Preller had taken off his coat and vest, but it could be proven that he did not, that he went into room 144 fully dressed, and was stripped after the murder. The drawers and coat and vest belonging to Preller were taken from Maxwell's baggage turned inside out. This showed that the garments were stripped from the dead body and had not been voluntarily taken off.

He—that man there—denied the mother whose sorrows he drags here into the court to shield him from the consequences of his crime. He denied her very existence and that of his father. I might be induced to deny a friend or a stranger, but so help me God I never would, under any circumstances, deny my own mother. Why did he deny his parents? Because there was something pressing on his mind; there was something wrong with his record.

The actions of the prisoner after the alleged murder were very relevant. His talk and his actions were entirely inconsistent with those of a man crazed with grief at the sudden killing of a friend. Was he crazed with grief when he went down in that shooting-gallery an hour after killing his friend

and began shooting at the bulls-eye, and talking about Turkish women and the girls at the Southern hotel? Was he crazed with grief when he bought the flute, the diamond ring and the field-glasses? When he told of the Russians he had killed with his big revolver.

The flight of Maxwell was also most revelant to his guilt. His assumption of the character of a Frenchman and the good time he had on the overland trip; his aetions in San Francisco and the manner in which he spent his time. He formed another acquaintance there. He met a man named McDonald. This man showed him a ticket to Auckland and said he had money on board the ship. The defendant had that little hypodermic syringe filled with poison with him at that time. I firmly believe that he intended to treat that man as he had Preller, but the man was too much for him. He got his \$80 and gave him a worthless watch and that closed that transaction. They talked here of detective methods and police methods. It is only a certain element in this country that are afraid of detective and police methods. It is the criminal element, the element that would scale the dome of the capitol and tear down the stars and stripes and raise in its place the red flag of anarchy. I am responsible for the detective methods in this case, and I am willing to meet the gentlemen on that issue. McCullough told the truth on that stand. We indicted this man after he was brought back and knew nothing about the hypodermic syringe until McCullough told us. We found it among the effects brought back from Auckland, but paid no attention to it.

The empty bottle, found in the room 144, and which had contained chloroform would prove by the defendant's statement that he was lying. (*Mr. McDonald* filled the bottle with water and, suggesting a cuspidor as the wash basin, said that if the bottle had fallen in and the contents spilled, as the defendant said, the bottle would have been broken.)

Mr. Fauntleroy objected to the illustration on the ground that a spittoon had no resemblance to a marble wash-basin, and that there was no description of the wash-basin in evidence.

The COURT ruled that Mr. McDonald should keep within the evidence.

Mr. McDonald. We take the ground that if the bottle had fallen into the basin it would have made a noise loud enough to attract his attention, and he could have saved some of the chloroform. We do not believe the defendant's story, but showed that the whole amount of chloroform was administered to Preller.

No feature of the case is consistent with the innocence of the prisoner. Remember his actions in placing the body in the trunk and mutilating it. Then the bloodstain on the shirt. The stain was not caused by a drop of blood, but the shirt was used to staunch a wound, and that wound was on Preller's breast. That is where the blood came from. These actions of the prisoner after his arrest. He did not say yes, I am Maxwell, the man you are after. He tried to hide his identity and claimed to be a Frenchman named D'Aquier. He did not act like an innocent man who accidentally killed his friend. He said he supposed when the body was discovered that the post-mortem examination would show the cause of death.

He knew that the body would not be discovered for some days. To prevent its discovery he took the key of the room with him. He knew, and every man knew, that the longer a dead body is concealed the more difficult it is to assign the cause of death by the post-mortem examination. Maxwell knew that and yet he left the body of his dead friend rotting in a trunk. We appeal to you not to be influenced by sentiment but to act on the law and the evidence. There are two sides to the sentiment in this case. There was another family in England waiting for the verdict and I hope it will not be one that will blast the character of a dead member of that family; that the jury will vindicate the law and convict the prisoner.

Mr. Martin impressed the jury with the responsibilities which rested upon them, and hoped they would not act hastily in a case of life or death. The law compelled the state's offi-

cers in opening the case, to outline all the evidence which they propose to bring before the jury to convict the defendant. Nothing was said in that opening about bombshells or sensations. The state kept that evidence in the dark and violated the law. When this case is given to you for final adjudication, go back to that speech of Bishop's, in which he told you that it is the duty of the state's officers to present their case in a fair, honorable—mark you, honorable manner. Have they done it? They talk as though the state's officers had limited power. Why, gentlemen, the state's officers have all the advantage. When we are through with this case, when our last appeal has been made to the court and jury, the prosecuting-attorney can then come forward and make his argument. He can review the evidence and the speeches and create new feelings and impressions.

Then remember the advantages of the circuit-attorney in summoning witnesses and securing indictments. A special detective was especially assigned to the office and every word and every action of a defendant or a witness was caught up, worked up and magnified into circumstantial evidence. The McCullough episode and the assistant circuit attorney's unblushing effrontery, was unparalleled. Before the ascendancy of this man McDonald into power such things were unknown. Never in the history of the criminal court has such a disgraceful, fiendish, depraved transaction occurred. That is strong language, gentlemen, and you may ask me to explain myself. I will do it. I will explain my words.

Mr. Clover. What paper is that?

Mr. Martin. It is an exhibit of the infamous conduct of this tool McCullough and has been in evidence. It is the warrant and the record of the case against Frank Dingfelder. What have you got to say about it Mr. Clover?

Mr. Clover. I'll take my medicine, John, and I'll have my say when you are through.

Mr. Martin. I hope you will take your medicine, Mr. Clover, and if you take this medicine, this dose is perjury,

forgery and deception, and if it makes you repudiate the whole transaction the good people of St. Louis will take you by the hand and say well done.

Perjury was committed in securing the warrant and forgery in presenting the check. (Illustrations of the manner in which private detectives operate were given and the whole tribe characterized as frauds and cheats. Their work in divorce cases was specially commented on.)

So infamous did the practices of private detectives become several years ago that a law was passed putting them under the surveillance of the police. The arrest of Dingfelder, in the Mechanics' bank, was the wonderful detective ability shown by Mr. Furlong, who was "the Pinkerton of the West."

The jail life of McCullough was described in detail. The speaker claimed that the purpose was to please Furlong and McDonald and to furnish a confession to puff up their vanity. It made no difference whether the confession was made, it must be furnished.

The deception on the grand jury was next taken up. When the assistant circuit-attorney was sworn in he took upon himself sacred obligations. He swore he would truthfully present no case before the grand jury which he believed did not belong there. No one should be presented for favor or reward and no one should remain unrepresented for fear or affection.

What is the conduct of McDonald in the light of the sacred oath he has taken. Instead of guiding the grand jury he misled them. He forced them to unconsciously commit perjury, and violated his own oath at the same time. Now, gentlemen, will you be guided by that man? Will you allow yourself to be made a tool of to gratify his ambition?

June 4.

Mr. Martin explained to the jury what the court meant by the instruction regarding a reasonable doubt. It meant that each and every member of the jury should be convinced to a moral certainty. In a matter of life and death the reasonable doubt of any kind in the minds of the jurors should be care-

fully considered and the benefit given to the prisoner. The speaker next took up certain points made by Mr. McDonald. He charged that the assistant circuit-attorney did not confine himself to the evidence, but dragged in outside matters in an attempt to blind the jury to the true facts in the case. McDonald's speech was filled with a venomous, vindictive spirit. He was an iconoclast who destroyed his own case in attempting to destroy the defense by an unfair means. He did not think it was a peculiar coincidence that a San Francisco confidence man should be named McDonald. A confidence man was only one degree removed from a detective. When McDonald, the prosecutor, was arguing the case, he attempted to practice a confidence game on the jury by calling each by name and patting him on the knee and talking to him as if he was an old friend.

That is a confidence game, only in this case he is trying to obtain a verdict by fraud. He says he would not rush into a verdict. Don't you know, gentlemen, he does not mean that? He would rush you if he could. He wants a verdict against the defendant and the sooner the better. This man with his venomous words had attempted to slander the character of the witnesses who testified to the defendant's good character. His insinuations are groundless and you have only to read the instructions of the court on that point. There must be something besides insinuations to injure these depositions.

All the testimony as to character showed that the defendant was an honorable, upright, conscientious young gentleman, who was kind, affectionate and religious. It was shown that the defendant was a pure, good young man surrounded by a few unfortunate circumstances which could easily be explained to any unprejudiced mind. The meeting between Brooks and his father in the circuit attorney's office was brought before you, and we denounced the action of the State in exposing the sanctity of the meeting. I have been told that even the cold-hearted McDonald shed a tear when he witnessed that meeting. I believe that it was not a tear, but that McDonald turned his head with a feeling of triumph and

gloated over the belief that he had secured another piece of circumstantial evidence.

The action of Mr. McDonald in keeping out the crowd from the courtroom was the work of a tyrant. The public could only get admission after the attorneys for the defense had appealed to the court. The State had held out that when McCullough went on the stand he put his character in issue, and the defense did not attack it. It was true the character was put in issue, but the surprise occasioned by McCullough's appearance was so great that the defense had no time to investigate his character, and it was not good logic to believe that because a man's character was not attacked it was good. Mr. McDonald was like a nymph who charmed King Herod and procured the head of John the Baptist. McDonald had charmed King Furlong, and the only thing he wanted was the head of Brooks, and Furlong promised it to him. The State has suppressed evidence, and only produced it at last through fear of losing favor with the jury. When Dr. Nidelet was at last placed on the stand he testified that the body found in the trunk was in an advanced stage of decomposition. This was the fact the State was trying so hard to keep out. Dr. Nidelet also testified to the rupture, which was such an important matter to the defense.

The identification of the body by the witnesses of the State was unnecessary. The defense never denied that the body was that of Preller, but the ridiculous testimony submitted by the State to prove the identification was a sample of the whole State's case. Frazer said he recognized Preller by the color of his eyes—this five months after his death. Others recognized him by the shape of his nose, and the color of his hair. The action of the State in not submitting to the defense the organs dissected from Preller was a trick to suppress the truth. If the parts had been produced in court an examination would have corroborated the testimony of Dr. Nidelet and shown that an operation had been attempted on Preller. The representatives of the State violated the law in not notifying the defense of the proposed resurrection.

The action of the attorneys in the Mary Mudd case shows the differences in the practices of some lawyers. In that case the attorneys who exhumed the body gave those on the other side three days' notice and medical experts from both sides went to the grave together. The organs of Preller were not produced in court, because if they were the State's case would be ruined.

It was true that the firm of Martin & Fauntleroy had gone a few hundred miles to meet Brooks, but had only done so upon receipt of dispatches from San Francisco, where the prisoner had legal counsel who referred him to Martin & Fauntleroy.

Mr. McDonald did not explain how he went to Washington and attempted to upset the plans of the police board and get himself agent of the State to go to Auckland. If he had been appointed, there would have been no McCullough in the case. He would have done what honest detectives like Tracy and Badger could not do. He would have furnished a confession.

The State's representatives had stated that they knew nothing of the hypodermic syringe until McCullough told them about it. This was a misrepresentation. Detective Badger said he found the syringe in Maxwell's effects at Auckland and turned it over to the circuit attorney. McDonald knew of it, but only assumed ignorance in order to bolster up the McCullough confession. If Maxwell had used the syringe on Preller he could easily have killed him with the morphine as there was enough in the bottle to kill two men. There would be no need to get chloroform to complete the work. Mr. McDonald manipulated the property of Preller for effect. While waiting for evidence he would drag in trunks and clothes for the purpose of creating prejudices in the minds of the jury. It was an old trick, but it was hoped it had no effect in the present case. Dr. Bauer testified that the manner in which the defendant administered the chloroform was the right way. Remember the instruction of the court for manslaughter and keep the matter before your minds. McCullough in repeating the confession said that Maxwell told him

that Preller took off his coat and vest before the morphine was injected. McDonald claimed that the clothes were stripped from Preller's body and exhibited several garments turned inside out which he alleged belonged to Preller. There was no evidence to that effect. It was another detective trick. The examination in chief of the prisoner was the only true story of the case. The cross-examination failed to affect the truth of the defendant's story, and all Mr. Clover could bring out was that the defendant lied. He was not half the liar that McCullough was. The jury must not forget the instructions on the reasonable doubt.

Mr. Clover began by referring to the embarrassment under which he labored. He anticipated that the case would have been finally submitted to the jury Wednesday, but he did all in his power to submit the evidence as fast as possible. The responsibilities under which he labored annoyed and embarrassed him. Bits of evidence that had been submitted in a few hours, required months of labor and large expenditures of money to secure and properly introduce. He had waited since last Tuesday to make the closing speech, and here it was Friday before the opportunity had arrived. He was going over a beaten path and was going over it quickly. He would sacrifice all his feelings, all his ambitions in the case for the purpose of lessening the arduous duties imposed on the jury. He recognized that there must be an end to everything and it was time for this notorious trial to end. Mr. Martin had said that the state had the advantage, as there was four arguments for the prosecution to two for the defense. The speaker was of the opinion that there had been only one argument for the defense, as no one would dignify Mr. Martin's harangue as an argument. It reminded him of the words of the Bastard in King John, who said: "I was never so bethumped with words since I called my brother's father dad."

Mr. Clover said he did not intend to answer all the attacks made by Mr. Martin. He remembered, however, that it was due to his clemency and charity that a certain party was once saved. People who live in glass houses should not throw

stones. He did not propose to meet villification with villification. Only one argument had been made by the defense, and that was made by Mr. Fauntleroy. He had argued the innocence of the defendant on the ground that he had a good character before he left England. You will remember, gentlemen, that the defense said that all the advantages were on the side of the state; that they had received no favors from the state. Why, gentlemen, these very depositions came to this country improperly certified. They could not have been read in a court of justice in this country, and Mr. Fauntleroy recognized that fact and came to me and asked my permission to allow them to be read. There was no objection made and the depositions, although informal, were allowed to go in.

Mr. Fauntleroy. I object to this, your Honor, because if the circuit attorney had not allowed the depositions to go in we could have obtained a continuance and put the state to an enormous expense. The favor which he said he granted redounded more to the benefit of the state than to the defense.

Mr. Clover. I remember another case where Mr. Fauntleroy requested some official papers which he could not obtain himself. I obtained the papers for him, and at a certain period he had to disavow—

Mr. Fauntleroy. I object to these remarks, as they are entirely foreign to the case.

Mr. Clover. If it hurts you I will abandon the subject.

Mr. Fauntleroy. It don't hurt me.

Mr. Clover. Well, take your medicine then. This is not half as cowardly as the act of that man (Martin) who attacked McDonald when he knew he could not reply.

Mr. Martin. I object to this, your honor—

Mr. Clover. I said yesterday, I would take my medicine, now take yours.

THE COURT. Gentlemen, this scene must not be repeated. I don't know what you mean by this medicine, but this thing must be stopped. I am sorry, gentlemen, that so much personal feeling has been exhibited in this case, but you will understand that it does not affect the main issue—the innocence or guilt of the defendant.

Mr. Clover. Mr. Martin said that the carriage driver was the only honest man who accompanied the state's representatives to Bellefontaine to resurrect the body of Preller, and that it was the carriage driver who exposed the excursion. I was the carriage driver. No one handled the lines but myself and Mr. McDonald. You can see the mountain which has been created out of a mole hill.

They have told you, gentlemen, that the state has tried to suppress the evidence in this case, and that the reason the defense was kept secret was because they expected to reap benefits from the evidence of the state's witnesses. More particularly the witnesses brought from other cities. There were three foreign witnesses, gentlemen. First there was Mr. Warren. What did he say that could benefit the defendant? He said he recognized him as a drunkard and debauchee, was that of any benefit to him? Mr. Frazer was brought here for the purpose of positively identifying the body of Preller. He said nothing that would benefit the defendant. Mr. Johnson was brought from Philadelphia for the purpose of testifying that the defendant was a liar and an impostor, was that of any benefit? As I said, the whole defense is based on the assertion that the defendant was a man of good character. I don't think that the best witnesses for a young man's character are people his senior by many years, people who know nothing of his daily life, and who would be the last to get a glimpse of his true character. How was it, gentlemen, that this man left Hyde in the possession of a good character, and fifty-six hours after was an impostor, a thief and a forger? What great revolution accomplished this? Was it something in the ocean breezes? How came it that within such a short space an English solicitor and medical student was transformed into the greatest impostor of the age? Remember the resurrection of the body two weeks ago, and the manner in which the defense had been overthrown by the testimony of Dr. Prewitt. Remember the appearance of the body at the time it was discovered in the trunk. The defense had not explained what caused the tongue to protrude and the

eyes to bulge. The defendant had stated that the body dropped into the trunk gracefully after life was extinct. The state, however, claimed that death was caused by morphine, chloroform and strangulation. Either that or the defendant produced the results by barbarously forcing the body in the trunk. Regarding the McCullough episode I believe every word the detective spoke. What harm could a detective do a man of the defendant's character. The state did not rely on McCullough's evidence. But when it came to choose between McCullough's testimony and the defendant's, I would believe the former every time.

The deceased was a commercial traveler. A kind, generous young man, who had started out in life with every indication of success. A young man who had received an excellent education and whose family was at one time in good circumstances, but through business reverses had become reduced. This young man had made a trip around the world, and through the unfortunate reverses of his family, became at last their only support. Finally he disappeared, and the family received word that he had been killed in a horrible manner. They were in doubt, conflicting stories were received. Meanwhile they had become entirely penniless, and as the good son had insured his life for the benefit of his family, they made application for the insurance money. The companies asserted that the son was not dead, and refused to pay the money. There was one man who could say whether he was dead or alive and he was appealed to, but kept his mouth shut. The family came almost to starvation, and that man still refused to speak and did not speak until his own salvation forced him. If the jury desired to consider sentiment, they should keep that in mind.

THE VERDICT AND SENTENCE.

June 5.

The *Jury* who had retired to consider last night, returned with the following written verdict: "We, the jury, find the

defendant guilty of murder in the first degree as charged in the indictment. M. S. Barnett, Foreman.'"

On June 10, a motion for a new trial was made which was overruled on July 7. On July 10, a motion in arrest of judgment was made which was overruled on July 14, and the prisoner on that day was sentenced to be hanged on August 27.

On July 14, an appeal was taken to the Supreme Court and a stay of execution granted.

At the April term, 1887, the conviction was affirmed by the Supreme Court, 92 Mo. Rep. 543.

On August 4th, a writ of error was allowed to the Supreme Court of the United States.

On January 9, 1888, the appeal was argued before the Supreme Court at Washington, D. C., and on January 23d, that tribunal dismissed the appeal.

* Guilty! This was the verdict of the jury in the case of the State of Missouri against H. M. Brooks, alias Maxwell, under indictment for murder in the first degree. It was anticipated by many and indorsed by all. When court adjourned a few minutes after 11 o'clock Friday night one ballot had been taken by the jury. It resulted in nine for murder in the first degree, two for manslaughter in the fourth degree, and one for acquittal. Messrs. Beggs, Barry, Cuolohan, Chamberlain, Child, Jacobs, Hendricks, Blumenthal and Cahill voted for conviction; Messrs. Barnett and Sears for manslaughter, and Dozier for acquittal. After being conveyed to their sleeping apartments, several hours were spent in discussion. Mr. Sears said he never would convict Maxwell until he was entirely convinced that he had murdered Preller. He believed he had committed some offense and was willing to send him to the penitentiary, but did not like to shoulder the responsibility for his death. The State's forces were led by Cahill, Hendricks, and Beggs, and they at once began work on Mr. Barnett, who was chief of the opposition. They argued with some success before retiring for the night, and yesterday morning the issue was again taken up. Another ballot was taken about this time and showed nine for conviction and three for manslaughter, Dozier having disabused his mind of the entire innocence of the defendant. Mr. Hendricks and Mr. Cahill both made a desperate attack on the position occupied by Mr. Barnett. They showed how inconsistent Maxwell's evidence was, but Mr. Barnett was still uncertain. He was somewhat in the dark regarding the instructions of the Court on circumstantial evidence, Mr. Barnett held that the circumstantial evidence was consistent with innocence as well as guilt. He was shown that if the killing had been accidental Maxwell would have torn the underclothing off Preller instead of cutting it off with scissors. By this time Mr. Barnett came around and joined the forces of the State. Dozier and Sears still remained, and in an hour, they, too, were brought around.—*St. Louis Republican*, June 6, 1886.

A number of petitions were sent to Governor Morehouse^b asking for the commutation of the sentence. And several of the leaders of the St. Louis bar, Alexander Martin, Charles P. Johnson, James O. Broadhead, Thomas J. Portis, James E. McKeigan, to which was added Bishop Daniel S. Tuttle wrote letters to him to the same effect on the ground that the admission of the testimony of the sham prisoner, McCullough, was a travesty on justice.

But the Governor refused to interfere.

THE EXECUTION.

August 10, 1888.

Maxwell passed a restless night and took very little sleep. Between 2 and 4 he sat in his cell and glanced at the leaves of a book that he held in his hand, turning the pages nervously and shifting his position. At times he held his hands clasped over his forehead and by a sudden move would run them through his short cropped hair. He puffed his omnipresent cigarette, lighting another as soon as one would burn out.

In the adjoining cell Landgraf,¹ who had retired at 10.30 o'clock, slept quietly. The near approach of death did not have the same effect upon him that it did upon his more intelligent and more sensitive companion in the adjoining cell. When he lay down for the night he requested the deputies not to permit any loud talking as he was very anxious to take a nap.

Maxwell did not retire until after 12 asking to be awakened at 2. At 2 he arose and sat on the side of his cot. When asked by Deputy Burke if he would drink a cup of coffee he shook his head, but hastily reconsidered. The coffee was given him. He then resumed reading until Father Tihan arrived at 3.30. The priest had converted the prisoner to the Roman Catholic faith. He remained with him until after 4 when the prisoner again stretched himself on his cot, with his hands across his face, and remained in that position until 5 o'clock. In the meantime Landgraf had awakened and dressed himself. The Sheriff arrived at 5.30 o'clock, and was met by a force of his deputies, who were awaiting instructions.

Long before midnight there were many people in the streets. Men were constantly leaving for and running back from the saloons across the street, the proprietors of which with an eye to business declared they would keep open all night. There were many at the saloons who were rapidly getting into the condition of my Lord

^b MOREHOUSE, ALBERT P. (1856-1891). Born in Ohio and came to Missouri when a youth; taught school, then studied law; admitted to bar and practiced at Maryville. Member of Missouri Legislature for several terms. Lieutenant-Governor (Mo.) 1884-1887. Governor one year on death of Governor Marmaduke. Committed suicide at Maryville.

¹ Henry Landgraf was hanged for the murder of his sweetheart, Annie Tisch, on March 5, 1885, in St. Louis.

Tomnoddy and his friends who chartered the Magpie and the Stump. A suggestive spectacle was that of a man with his ticket of admission stuck in the band of his hat like a railroad tag, and a part of whose accoutrements was a whiskey bottle, the contents of which he at intervals transferred to his own inwards. The crowds began collecting about the jail at dawn and stared intently at the heavy walls and iron bars covering the windows. Those who possessed the necessary cardboards obtained ingress, and others were passed in by deputy sheriffs who would have had the jail thronged but for the early arrival of Sheriff Harrington, who placed something of a check on the liberties taken by his assistants. The crowd that gained admittance was a mixed one. There were well-dressed and ill-dressed men, dignified looking personages, and tough looking individuals who jostled one another, talked, smoked and seemed to enjoy the privilege that had been accorded them. There were saloon-keepers and local pugilists in the gathering, a number of whom had witnessed previous executions, as their conversation indicated. When Jailer Callahan was asked how so many persons managed to get in the jail, he explained that the only tickets he issued were to newspaper reporters. It then became known that the Sheriff's deputies had admitted their friends, which had the effect of materially swelling the crowd.

At 1 a. m. John I. Martin received a telegram from P. W. Fauntleroy, stating that the Governor had received a cablegram from the British Government asking him to grant a respite in order to sufficiently inquire into circumstances; that the Governor still believed that the inquiry meant was to be made by Missouri and not by the British Government; that Mr. Fauntleroy had wired the British Minister again, and was urging the Governor to delay hanging until the doubt be removed, but that the Governor would promise nothing.

The announcement that the Sheriff had decided to delay the execution until 8.45 at the request of Maxwell's counsel caused a surprise, as 6.30 had been decided upon as the time. The crowd soon learned that Mr. Fauntleroy was waiting in Jefferson City, looking and hoping for a message from the British Government, which might have some effect upon the Governor who had refused to either commute or respite their client. Mr. Martin sat in his office across the street from the Four Courts with Mr. A. J. P. Garesche ready to send any word to the jail that might stay the hand of death. Sheriff Harrington consented to the delay after a consultation with his attorney, Mr. E. T. Farish. The additional time was employed in prayer and in listening to the consoling words of the spiritual director. Before 8 Father Tihan administered the last rights of the Catholic church to them and spoke to them consolingly.

At 8.45 Sheriff Harrington entered bearing a black bordered sheet of paper, recognized at once as the death warrant. While the Sheriff was reading the warrant to the men the crowd was with difficulty kept back. The reading occupied but a few minutes. Two deputies were in readiness with stout cords, with which they securely

bound the arms of Maxwell and Landgraf. Maxwell wore a dark suit, with a black Prince Albert coat and a white shirt and collar; Landgraf a dark suit of coarser texture. The procession to the gallows was quickly formed. Sheriff Harrington walked in the lead and was followed by the condemned men, Father Tihan walked between the two and a deputy sheriff on either side. Both men were pale, but neither showed any signs of weakening. On the march to the scaffold, Father Tihan exhorted them to put their trust in God and die resigned to His will. The crowd, many of whom were inclined to be boisterous, followed the ten deputy sheriffs, who walked directly behind the prisoners and their spiritual counselor. Across the corridor and through the old jail hospital, the procession filed until the yard was reached. Up to the time the scaffold was reached neither showed any indication of breaking down. Maxwell looked pale and nervous and Landgraf had a wild look in his face. The lips of both men were moving in prayer. The crowd uncovered their heads and watched the proceedings closely, so as not to miss a single incident.

The ropes were in position and Deputies Fortin and Jerik arranged the noose around each prisoner at the same instant. The black caps were adjusted in a few seconds, the nooses were slipped over their heads, their legs were pinioned, and the trap was sprung. Maxwell twitched somewhat after the body rebounded as though he was dying of strangulation. There was no twitching in the muscles of Landgraf, which showed his neck had been broken by the shock. The crowd on the embankment made a rush to get under the scaffold at the drop, but Chief Huebler with a strong detail of police kept that space for physicians, newspaper representatives and others. Dispensary Physicians W. G. Priest and B. V. Steinmetz grasped Maxwell's wrists and announced the state of his pulse, while Drs. Jacobson and Murray handled Landgraf. It could be seen that Maxwell was dying hard. His muscles twitched and tremors passed through his body indicating the struggle between life and death. The drop was sprung at 8.56 to the second, and it was not until 9.10 that he was pronounced dead by Doctors Priest and Jacobson.

With Landgraf it was different. Eleven minutes after the drop life was pronounced extinct. Both bodies were allowed to hang until eighteen minutes after the drop, when they were cut down and taken into the Morgue. Dr. Lutz held the post-mortem examination and reported that both necks were broken.

Just as the two men fell to death, John I. Martin clamored at the jail door for admittance. He had a telegram in his hand and his face was flushed. This was the telegram:

Jefferson City, August 10, 1888.

John I. Martin, St. Louis.

Now, at quarter to 9, I receive notice that my telegram has been delivered by special messenger to British Minister, and I am expecting his answer every minute, which will remove the Governor's

mistake. Governor refuses my request that he delay until answer comes, but said could ask Sheriff myself to hold up execution. Urge him to do so.

Fauntleroy.

When he got to the door of the jail, a guard said: "It's all over." Mr. Martin put his hand to his head and turned away, faint and pale. "Too late," he said, as he stumbled to his office.

Crowds thronged about the Morgue after the post-mortem, and although a strong cordon of police surrounded the structure, it was with difficulty the crowd was kept back from the entrance. The throng became so dense that traffic on Spruce street was entirely suspended after noon. Several arrests for disorderly conduct were made.

Maxwell's body was sent to Lynch's undertaking rooms on Olive street. There the body was prepared for burial. It was clothed in a black shroud, and placed in a rosewood coffin, with the inscription Hugh M. Brooks on the head-plate.

At 2 o'clock Mrs. Brooks and Miss Annie Brooks called at the rooms in company with Mr. John I. Martin and other friends, where they viewed the remains. They bore up bravely and shed their tears in silence. The coffin was placed in a hearse and taken to a receiving vault at Calvary.

When the post-mortem examination on Landgraf's remains was at an end, the brother of the deceased took the body and had it removed to an undertaker's office to be prepared for interment. The body was interred in a German church cemetery near Belleville, where several of his relatives were resting.

After the execution Sheriff Harrington was besieged for pieces of the rope used in the execution of Maxwell. The matter was left in the hands of Deputy Fortin, who took away the rope without giving anybody pieces.—*St. Louis Globe-Democrat*, August 11, 1888.

THE TRIAL OF FRANZ VON RITTER ON HABEAS CORPUS FOR FALSE IMPRISONMENT, PHILA- DELPHIA, PENNSYLVANIA, 1816.

THE NARRATIVE.

This was in fact though not in form the trial of the captain of a sailing vessel for the false imprisonment of a number of passengers. It was early in the last century when emigration from Europe to this country was much encouraged and when emigrants were flocking to our shores. There was a German society in Philadelphia, which looked after poor German emigrants on their arrival and one day this society learned that there was a sailing vessel in the harbor on which were a number of Swiss and German passengers whom the captain would not allow to land. So the society obtained a *habeas corpus* from the Chief Justice of the Supreme Court which brought before him one of the detained emigrants, Von Ritter and the captain of the brig. The latter said that he was holding Von Ritter and the others, because when they came on board his ship at Amsterdam they said they had no money to pay for their passage; that they wanted to go to America and if the captain would take them there they would give themselves as security and would not leave the ship until they had found people in the new country who in consideration of their binding themselves to work for them would advance them their passage money. The captain agreed to this and a contract was drawn up to this effect and it was under that contract that he was holding them.

The lawyer for the German Society admitted the agreement as stated but argued that it was such an oppressive contract that a court ought not to enforce it; it was also a contract against public policy. And even if the court should hold it valid and binding yet as the captain had broken some of his promises in the same agreement—among others that he would

give his passengers good food and treat them properly—the emigrants were discharged from their part of the contract.

But the Chief Justice said that the contract was reasonable and not against public policy; that one party not performing did not excuse the other from doing what he promised and he sent Von Ritter back to his ship to remain there with his fellow passengers until somebody redeemed them by giving them employment and paying their debts.

THE TRIAL.¹

In the Supreme Court of Pennsylvania. Philadelphia, October, 1816.

HON. WILLIAM TILGHMAN,² *Chief Justice.*

October 20.

Franz A. Von Ritter complained through his attorney that he and others were being forcibly restrained of their liberty and detained against their will on board the brig *Ceres*, then lying in the Delaware River near Philadelphia by the captain of said brig, one Schultz. A *habeas corpus* having been granted Von Ritter was produced in court today and Captain Schultz, by his attorney, made the following return:

That Von Ritter was one of a number of poor Germans who, having no money with which to pay for their passage came on board the brig at Amsterdam where an agreement was made between the captain and them that they were, on their arrival at an American port not to leave the ship until their passage money should be paid or secured by persons who would engage them to work for them in America.

The Counsel for Von Ritter argued that such a contract was void as being both unconscientious and against public policy and if it were not void it had been discharged by the failure of the captain to perform promises he had made on his part.

TILGHMAN, *Chief Justice*: It is not pretended that the passengers in this vessel are to pay more than the usual freight

¹ Wheeler's Crim. Cas. See 1 Am. St. Tr. 108.

² See 7 Am. St. Tr. 746.

or that any deception was put upon them, at the time of entering into the contract. They came on board in the usual way, and made such an agreement for their passage as is commonly made. Having no money, nor being able to find security at Amsterdam, they stipulated not to leave the brig till they had paid for their passage. They knew very well that they could make no money during the passage, nor could they expect to borrow it on their arrival in a strange country. But it was also known that by indenting themselves to serve for a term of years, the money might be raised; and in order to secure the captain who carried them over the sea, and supplied them with provisions, they promised not to leave the brig until they had paid for their passage, which in substance amounted to an engagement to raise the money by indenting themselves before they left the brig. Their object was to advance their fortunes in a new country—an object which had been frequently attained by their countrymen, who had gone to America before them; and it is not easy to conceive any better means of accomplishing their object than those which were taken. Supposing, then, the contract to have been fairly complied with on the part of the captain, I can perceive nothing in it unreasonable and unconscientious; on the contrary, it was advantageous to the emigrants. Having no money, they obtained credit by giving the only security in their power—a security, which, if not abused on the part of the captain, could be productive of no hardship whatever.

But it is said to be against the general policy of our laws and government. If it be so, it must be either because of the indenture of servitude, or because of the right of the captain to detain the passengers until they enter into such indenture. Upon consideration of our laws and customs, it is extremely clear that an indenture of this kind is not only not against our policy, but that it is conformable to the policy and custom which has prevailed from the earliest times. In the case of the *Commonwealth v. Keppeler*, 2 Dal. Rep. 197, the subject was materially considered, as appears from the opinion of Judge Bradford, who, as is well known, was remarkable for

deep and accurate research. He states this custom of persons coming from Europe, binding themselves and their children as servants in America, to pay for their passage, as having originated with the first adventurers to Virginia. It arose from the circumstances of the country; and being found eventually beneficial to the merchant and the adventurer, it has never ceased, but was introduced into Maryland and Pennsylvania, which were colonized after Virginia. We find it referred to in our statute book so early as the year 1700; in fact, there was a convenience in it so obvious that it could not be relinquished. It has been the favorite policy of Pennsylvania to encourage, particularly, the importation of Germans. The name of German Redemptioner, which implies servitude, is familiar to her laws. Servitude of this kind is no disgrace; and the soundness of the policy which encouraged it is proved by this notorious fact, that many of the Redemptioners, having honestly served out their time, have arisen to eminence both of character and fortune; and the same remark is applicable to many who have been imported from Great Britain and Ireland. Our laws have paid particular attention to Germans, because we seem to have expected a greater immigration from Germany than from any other country—because we considered them as a steady, sober, industrious people, remarkably fitted for agriculture—and because, being ignorant of our language, they stand more in need of legislative protection than the emigrants from our mother country. Accordingly, we find that on the 8th of April, 1785, an act was passed “for establishing the office of a register of all German passengers who shall arrive at the port of Philadelphia, and of all indentures by which any of them shall be bound servants for their freight, and of the assignment of such servants in the city of Philadelphia.” This act contained many provisions beneficial to the Germans; and by another act passed 12th of March, 1810, “all masters or mistresses of German Redemptioners who are minors, and who shall arrive at the port of Philadelphia after the passing of said act, shall give to the said Redemptioners six weeks schooling for every year of his or her

time of servitude; and it shall be the duty of the register of German passengers, to insert the same fully in their indentures." It cannot be denied, therefore, that this kind of servitude has been recognized and provided for by our laws; so that it only remains to consider, whether the right to detain the passenger on board till he pays the money, or, in other words, till he indents himself, is contrary to the genius of our laws or constitution.

If we wish for the importation of Germans, who have not money to pay their passage, we must permit the merchant who imports them to have security for his freight. Now, in what other way can these people give security than agreeing to remain on shipboard till they indent themselves as servants? I confess that none has occurred to me, nor has any been suggested by the learned counsel who have argued for the relator. They have said, indeed, that the passenger may agree in Europe to indent himself on his arrival in America, and the ship owner may sue him if he does not comply with his contract. But what security is there in that? The owner might as well have rested on a simple promise to pay the freight, and what advantage would the honest passenger derive from being sued on his contract? A fraudulent man, indeed, might think it for his interest to go to gaol, and come out by the insolvent act; but one who meant to act fairly, would rather remain on board till he had raised the money, than to subject himself to an action for the freight merely for the sake of setting his feet on shore a few days sooner. But it is objected that private imprisonment is odious and intolerable. I grant it, and should not be for ordering it; but how can this be called private imprisonment? Have not our laws provided that public officers shall visit the ship and examine the condition of the passengers? Is there not free access for the friends of the passengers, for strangers who wish to contract for their service, and for the members of that respectable society whose object and duty it is to afford relief to their countrymen in distress? If this access were denied, it might then, indeed, be called a private imprisonment, for

which this court would give immediate redress. Supposing then this right of detention to be exercised with mildness and humanity, according to the true meaning of the contract, I perceive nothing in it either inconsistent, oppressive, or impolitic; and in this sentiment I am supported by an authority no less than the legislature of the commonwealth; for by an act passed April 22d, 1794 (sec. 13), "it shall be lawful for the master, captain or owner, or consignee of any ship or vessel, importing passengers into this commonwealth as aforesaid, to keep and detain any such freight, on board the same ship or vessel wherein they were imported respectively, for the space of thirty days after their arrival opposite the city of Philadelphia, in order that they may have time to find out relations or friends, who may discharge their freight, or to agree with some person or persons, who shall be willing to pay the same in consideration of their servitude for a term of years, agreeably to custom."

The above is part of a law for establishing a health office, etc. The laws concerning the health office are various and complicated—several have been made and several repealed, in whole or in part. As the passage I have cited was not mentioned in the agreement, I presume it was supposed to be repealed. I will not take upon me to assert, positively, that it is not repealed, but after a pretty diligent search, I have not been able to find the repeal. If it be still in force, the right of detention is clear, because the thirty days given by the law have not expired. But even supposing it to be repealed, I am of opinion, for the reasons I have given, that the right still remains, in cases where the contract expressly stipulates for it.

But it is contended that the defendant, by violating his part of the contract, has forfeited his right of detention, because the stipulations on his part are in nature of a condition precedent, which must be strictly performed before he can have any remedy on the contract. This, however, is not the construction of the agreement. The word condition, is, indeed, to be found in it; but, on the whole, it appears to be an agree-

ment in which there are mutual covenants, on which each party may have an action although he may not have strictly complied with everything to be done by him. The captain agrees to bring the passengers to America, and furnish them on each day of the passage with certain articles of provision. On the other hand, the passengers promise to conduct themselves in an orderly and peaceable manner, and pay their freight at the end of the voyage. But it never could have been intended that if the captain failed in some small article on one day, he should, therefore, have nothing for bringing the passengers across the Atlantic; or, that a passenger, by one trifling act of rudeness or misbehavior, should forfeit all right to the benefit of the agreement. Von Ritter has been safely brought to America, which is the main point. For this he certainly must pay something, although he may have claims against the captain for breaches of the contract. Some breaches there certainly have been. I allude not to those acts of violence, rudeness and indecency done by the officers of the brig (though not by the captain personally) to many of the passengers, and particularly females. Although I highly disapprove of these things, yet they cannot properly be taken into consideration in the present inquiry. Personal injuries to others are not the concern of Von Ritter. For the beating of his wife, indeed, he has an intimate concern, but it is not a wrong of a nature that can be set off against the captain's claim to freight. But when I say that the contract has been broken, I mean in the article of provisions. Potatoes and vinegar were not furnished at all, and as to the rest, the passengers were put upon short allowance during great part of the voyage. It is insisted, indeed, by the captain, that this short allowance arose from necessity. It is a point on which I am not fully satisfied, but a jury will decide it, if it should ever be brought before them. But granting that there have been breaches of this contract, how can I measure the damages? It is a thing which, without the assistance of a jury, I could not pretend to. The question then is, whether, supposing for argument's sake, the claim of freight to be liable to some deduc-

tion, the captain, therefore, forfeits all right to detention. It appears to me that he does not; and that the right of detention remains until the whole balance of freight is paid. The agreement is, that the freight shall be paid and the passengers shall stay on board until it is paid, that is, until the whole is paid. If upon mature reflection it shall be thought by the German society, that this is a case which requires farther investigation, they will no doubt support the passengers in the prosecution of their rights. I see some of the members of that society attending here, and am glad to see them; they may render essential service by making a strict, but dispassionate inquiry into the conduct of all captains who arrive at this port with passengers; by discouraging all litigations about trifles, but firmly supporting their countrymen against every species of oppression, and every substantial breach of contract; on their conduct much depends. Their duty is important, and in the discharge of it they may do much good, or much ill. That they will choose the good, I hope; and I have no reason to doubt it. Upon the whole, it is my opinion that Von Ritter should return to the brig, and remain there according to his agreement.

THE TRIAL OF ROSE PASTOR STOKES FOR DISLOYALTY, KANSAS CITY, MISSOURI, 1918.

THE NARRATIVE.

Mrs. Rose Pastor Stokes, who lived in New York, was the wife of a rich philanthropist and social worker,^a and was herself a prominent Socialist and made many public speeches on social subjects throughout this country, was invited by the Woman's Dining Club of Kansas City to make an address at their dinner on the evening of March 16, 1918. This invitation was extended in the belief that on our entry into the great war she had left the Socialist party. Instead of that she proceeded to make an address of such a disloyal character as to drive from the room before it was concluded a number of the members and guests of the club. For she told the assembly that the Red Cross and the Food and Fuel Administrations were nothing but camouflage; that the American soldiers who had gone to France had been lured there by the false statement that this was a war to make the world safe for democracy; while they had really gone there to fight for Morgan and the other bankers, millionaires and profiteers of the country, and that when they came home and found how they had been tricked they would start a social revolution.

To make matters worse, when the next day a leading city newspaper printed a sketch of her address and her opinions under the heading: "Mrs. Stokes for the Government and

^a James Graham Phelps Stokes, usually described as an American Socialist, was born in New York City in 1872, graduated Yale, 1892; M. D., Columbia, 1896; School of Philosophy, 1897; (son of Anson Phelps Stokes, American financier); he married the prisoner in 1905. He has devoted his large fortune to the improvement of the condition of the poor, to Indian missions and education and became a leading member of the Socialistic party from which he withdrew in 1917 (together with other leaders when it opposed the war policy of President Wilson), and enlisted in the New York Artillery.

against war at the same time," she at once wrote a letter to it reiterating and emphasizing what she had said at the dinner. "I am *not* for the Government," she declared. "I made *no* such statement, and believe *no* such thing. I am for the people, while the Government is for the profiteers."

The Government, considering that the natural effect of this speech was to cause men to refuse to enter our army and navy, to obstruct and hinder recruiting and enlisting and to interfere with the operation and success of the military and naval authorities of the United States and to promote the success of the enemies of the United States charged her with a violation of the Espionage law, and she was promptly indicted and tried. Her main defense was that in speaking of and attacking the Government, she did not mean the people of the United States—the Nation—but was only referring to the Democratic administration that was conducting the war and conducting it, in her opinion, in an improper way. But she was found guilty and sentenced to imprisonment for ten years.

THE TRIAL.¹

In the United States District Court, Western District of Missouri, Kansas City, May, 1918.

HON. ARBA S. VAN VALKENBURG,² *Judge.*

On April 23, the grand jury returned an indictment against Rose Pastor Stokes, charging that on March 20, 1918, while the United States was at war with Germany she did at Kansas City, Mo., wil-

¹ *Bibliography.* "Transcript of Record. United States Court of Appeals, Eighth Circuit. No. 5255. Rose Pastor Stokes, Plaintiff in Error v. United States of America, Defendant in Error. In error to the District Court of the United States for the Western District of Missouri. Filed, September, 1918."

² "In the Circuit Court of Appeals, Eighth Circuit, No. 5255, Rose Pastor Stokes, Plaintiff in Error v. United States of America, Defendant in Error. Brief for Plaintiff in Error. Seymour Stedman, Harry Sullivan, Attorneys for Plaintiff in Error, Isaac Edward Ferguson, of Counsel. In error to the District Court of the United States for the Western District of Missouri. Champlin Law Printing Co."

³ "In the Circuit Court of Appeals, Eighth Circuit. Rose Pastor Stokes, Plaintiff in Error v. United States of America, Defendant

fully, unlawfully, knowingly, and feloniously attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, in that she did, then and there wilfully, unlawfully and feloniously prepare, publish and cause to be printed, published, distributed, circulated and conveyed in and by means of a certain newspaper called the *Kansas City Times*, being the morning edition of the *Kansas City Star*, a circular letter, to wit: (See the letter, *post*, p. 794.)

In a second count she was charged with doing the same act "to obstruct the recruiting and enlistment service of the United States and to the injury of the said service"; in a third count she was charged with doing the same act and making and conveying certain false reports and statements with the intent "to interfere with the operation and success of the military and naval forces of the United States and to promote the success of the enemies of the United States". The indictment concluded.

That the Government referred to in said false report, and false statement, letter and communication by her, the said Rose Pastor Stokes and intended to be referred to therein and thereby, and intended by her, the said Rose Pastor Stokes, to be understood by the readers of said false report, and false statement, letter and communication to be referred to therein and thereby, was and is the Government of the United States of America:

And that said false report, and false statement, letter and communication, then and there, was intended by her, the said Rose Pastor Stokes to declare, and did in substance declare that the Government of the United States of America so therein referred to and intended to be referred to, was not and is not established and maintained for the benefit of the people of the United States of America, but was and is established and maintained for the benefit of certain persons therein designated as profiteers.

And the grand jurors aforesaid upon their oaths aforesaid, do further present and charge that said report, statement, letter and

in Error. Brief for Defendant in Error. Francis M. Wilson, United States Attorney, Elmer B. Silvers, Assistant United States Attorney, Attorneys for Defendant in Error."

"Court's Charge to Jury. *United States of America v. Rose Pastor Stokes*, by Honorable A. S. Van Valkenburgh, Presiding Judge, United States District Court for the Western Division of the Western District of Missouri. Smith-Grievess Company, 714-716 Baltimore, Kansas City."

The *Kansas City Times*, May 20-24, 1918.

The *Kansas City Star*, May 20-24, 1918.

* VAN VALKENBURGH, ARBA SEYMOUR. Born 1862 near Syracuse, N. Y.; graduated Univ. of Mich., 1884; studied law at Ann Arbor and Kansas City to which place he removed, 1885; admitted to Bar, 1888; Asst. U. S. Atty., 1898-1905; U. S. Atty., 1905-1910; United States District Judge, 1910.

communication was and is false, and was, then and there, by her, the said Rose Pastor Stokes known to be false, in this, that the Government of the United States of America was and is established and maintained for the benefit and to provide for the common defense and to promote the general welfare of the people of the United States of America, and was not, and is not established and maintained for the benefit of certain persons designated in said false report, and false statement, letter and communication as profiteers.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that the said newspaper known, designated and entitled, as aforesaid, was then and there a newspaper of general circulation, generally circulated throughout the city of Kansas City, and throughout Jackson County, and throughout the State of Missouri, and throughout other states of the United States of America, and said newspaper then and there was a newspaper regularly printed and published in the city of Kansas City, in Jackson County, Missouri, as she, the said Rose Pastor Stokes, then and there, well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

On the same day the prisoner appeared in court and pleaded not guilty and gave bail to appear at the trial in the sum of \$10,000. On May 10, her counsel withdrew her plea and filed a demurrer to the indictment which was on May 18th overruled by the Court. An application for a bill of particulars was also denied, and the prisoner pleaded *not guilty*.

May 20.

The trial began today.

Francis M. Wilson,³ U. S. District Attorney; *Elmer B. Silvers*, Assistant U. S. District Attorney, and *S. A. Hargus*, Assistant U. S. District Attorney, for the Government.

Seymour Stedman and *Harry Sullivan*⁴ for the Prisoner.

The following jurors were selected and sworn: *J. R. Burns*, *Warner W. Caton*, foreman; *N. M. Colley*, *Geo. C. Conner*, *W. J. Frost*, *C. M. Hagan*, *H. W. Haynes*, *J. G. Holsinger*,

³ WILSON, FRANCIS MURRAY. Born 1867 Platte City, Mo.; educated Gaylor Acad. (Mo.); Vanderbilt Univ. and Center Coll., Ky.; admitted to Bar, 1889; City Atty. and Pros. Atty. (Platte Co.); State Senator, 1909-1913; President *Pro Tem.*, 1913; U. S. Dist. Atty., 1913-1920.

⁴ SULLIVAN, HARRY. Born 1862 Winchester, Greene Co., Ill.; educated at public schools; studied law with J. I. Sheppard, Ft. Scott, Kas.; admitted to Kansas Bar, 1917, and practices law at Kansas City, Kas.

J. M. Kincaid, Frank Ragland, W. L. Snow, W. W. Summer-ville.

Mr. Wilson opened the case by stating to the jury what the Government expected to prove.

THE WITNESSES FOR THE GOVERNMENT.

R. E. Stout. Am managing editor of the Kansas City *Star* and of the *Times*, which is the morning edition of the *Star*. This envelope and letter I received through the mail. I got it late in the afternoon of the 19th of March and as it was too late for the *Star*, I printed it in the *Times* the next morning. I had a copy of the letter made for our use and sent the original that afternoon to the District Attorney's office.

Mr. Wilson. This is the letter:
"Editor,
Kansas City *Star*.

Sir: I see that it is, after all, necessary to send a statement for publication under my own signature, and I trust that you will give it space in your columns.

A head-line in this evening's issue of the *Star* reads: 'Mrs. Stokes for Government and Against War at the same time'. I am *not* for the Government. In the interview that follows I am quoted as having said, 'I believe the Government of the United States should have the unqualified support of every citizen in its war aims.'

I made *no* such statement, and believe *no* such thing. No Government which is *for* the profiteers can be also *for* the people, and I am for the people, while the Government is for the profiteers.

I expect my working class point of views to receive no sympathy from your paper, but I do expect that the traditional courtesy of publication by the newspapers of a signed statement of correction, which even our most Bourbon papers grant, will be extended to this statement by yours.

Yours truly,
Rose Pastor Stokes.

March 18, 1918."

(The envelope has on it a picture of the Hotel Baltimore, a 3c stamp canceled, is postmarked Kansas City, Mo., and addressed Editor Kansas City *Star*.)

Mr. Wilson. I also introduce in evidence a copy of the *Star* of March 18 containing the article in the *Star* of which this letter speaks:

So she's back in socialism. Mrs. Stokes for the Government and Anti-War at the same time. Mrs. Rose Pastor Stokes, whose address before the Business Woman's Dining Club Saturday night

was characterized by a navy officer as disloyal and anarchistic, ~~denied~~ both charges today.

"As to my talk being 'terribly in favor of anarchy', she said, 'I only wish Emma Goldman could hear that. How many, many times I have disputed that subject with her! I don't think that charge needs any further notice'.

"As to the other things which have been published about the address Saturday night, even those who may have disagreed received it in a spirit of fairness and without any manifestation of disapproval. If there had been anything in it to warrant harsh criticisms, it seems strange that five hundred persons could have heard it through in such a spirit."

Mrs. Stokes said today that in the Saturday night address she emphasized the fact that America was forced into the war.

"Briefly" she said, "my statement was that while a very small minority of persons in America are in the war to make the world safe for capitalism, the overwhelming number of persons are in it to make the world safe for democracy. And that, ultimately, is the most significant issue of the great conflict."

Mrs. Stokes said today that she resigned from the Socialist party when the United States entered the war, because she disapproved the anti-war platform of the party adopted at St. Louis, but a few weeks ago became a member again after having decided the St. Louis platform, in the main, was right.

"I do not oppose the war, or its prosecution, in any sense", she said, "I can see, at present, no way in which it can end except by the defeat of Germany. I believe the government of the United States should have the unqualified support of every citizen in its war aims. My misgivings are that, whatever the outcome of the war, the capitalistic interests of the world may use it to further their commercial exploitation of undeveloped and under developed countries."

Mr. Wilson. I also introduce the *Times'* comments on the published letter which accompanied it:

After the publication in the *Star*, Sunday, of a part of Mrs. Stokes' address before the Woman's Dining Club, there was a division of sentiment among the members of the club as to whether Mrs. Stokes had said anything out of harmony with America's position in the war. Some of the members maintaining that Mrs. Stokes had said nothing to give offense in her speech in which she was quoted as saying she had reversed her position in regard to the war and returned to socialism; that the war was being fought to make the world safe for capital and not to make it safe for democracy. Others left the meeting declaring that Mrs. Stokes' remarks were outrageous.

A reporter for the *Star* talked to Mrs. Stokes Monday and received the impression that her views regarding the war aims of the government were more moderate than the publication of parts of

her address indicated, and she was quoted in the *Star* Monday as saying, 'I do not oppose the war or its prosecution in any sense. I can see at present no way in which it can end except by the defeat of Germany. I believe the government of the United States should have the unqualified support of every citizen in its war aims. My misgivings are that whatever the outcome of the war the capitalistic interests of the world may use it to further their commercial exploitation of undeveloped and under developed countries.'

Cross-examined. I received no reply from the District Attorney; I thought the Government should have the letter; I thought it was disloyal. Our circulation is about 440,000

Winnifred Houghney. Was employed on the 18th of last March at the Hotel Baltimore, as public stenographer. Mrs. Stokes asked me to write the letter just read and she signed it in my presence. A bell boy mailed it for her. The words italicized "not" and "for", were done by me at her request.

R. Brandenburger. Am employed at the *Star* office on the country circulation. The number of copies of the *Times* circulated on March 20, 1918 was 225,500. Copies went to these places: Fort Leavenworth, 292; Camp Funston, 1,212; Fort

Riley, 472; Camp Doniphan, 1,113; Camp Dodge, Iowa, 7; Camp Wadsworth, South Carolina, 2; Camp Cody, New Mexico, 1; Camp Pike, Arkansas, 14; Camp Wheeler, Georgia, 1; Camp Sharp, Mississippi, 1; Camp Devon, Massachusetts, 2; Camp Meade, 1; Camp Stanley, Texas, 1; Camp Lee, Virginia, 1.

The *Times* of March 20th circulated in every State in the Union. It is the paper Colonel Roosevelt writes for.

J. H. McCord. Am a Lieutenant Colonel of the military service of the United States detailed in the administration of the Selective Service Law for Missouri. The registration of male persons between the ages of 21 and 30 was had in Missouri on June 5th and a day or two later.

Mr. Wilson. We now will read in evidence the address of the President of the United States to the two houses of Congress presenting the question of war to these joint bodies.

Gentlemen of the Congress—I have called the Congress into extraordinary session because there are serious, very serious, choices of policy to be made, and made immediately, which it is neither right nor constitutionally permissible that I should assume the responsibility of making.

On the 3d of February last I officially laid before you the extraordinary announcement of the Imperial German Government, that on and after the 1st day of February it was its purpose to put aside all restraints of law or of humanity and use its submarines to sink every vessel that sought to approach either the ports of Great Britain and Ireland or the western coasts of Europe or any of the ports

controlled by the enemies of Germany within the Mediterranean. That had seemed to be the object of the German submarine warfare earlier in the war, but since April of last year the Imperial Government had somewhat restrained the commanders of its under-sea craft, in conformity with its promise, then given to us, that passenger boats should not be sunk, and that due warning would be given to all other vessels which its submarines might seek to destroy, when no resistance was offered or escape attempted, and care taken that their crews were given at least a fair chance to save their lives in their open boats. The precautions taken were meager and haphazard enough, as was proved in distressing instance after instance in the progress of the cruel and unmanly business, but a certain degree of restraint was observed.

The new policy has swept every restriction aside. Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents. Even hospital ships and ships carrying relief to the sorely bereaved and stricken people of Belgium, though the latter were provided with safe conduct through the proscribed areas by the German Government itself, and were distinguished by unmistakable marks of identity, have been sunk with the same reckless lack of compassion or of principle.

I was for a little while unable to believe that such things would in fact be done by any Government that had hitherto subscribed to the humane practices of civilized nations. International law had its origin in the attempt to set up some law which would be respected and observed upon the seas, where no nation had right of dominion and where lay the free highways of the world. By painful stage after stage has that law been built up with meager enough results, indeed, after all was accomplished that could be accomplished, but always with a clear view, at least, of what the heart and conscience of mankind demanded.

This minimum of right the German Government has swept aside under the plea of retaliation and necessity and because it had no weapons which it could use at sea except these, which it is impossible to employ, as it is employing them, without throwing to the wind all scruples of humanity or of respect for the understandings that were supposed to underlie the intercourse of the world.

I am not now thinking of the loss of property involved, immense and serious as that is, but only of the wanton and wholesale destruction of the lives of noncombatants, men, women and children, engaged in pursuits which have always even in darkest periods of modern history, been deemed innocent and legitimate. Property can be paid for; the lives of peaceful and innocent people can not be. The present German submarine warfare against commerce is a warfare against mankind.

It is a war against all nations. American ships have been sunk,

American lives taken, in ways which it has stirred us very deeply to learn of, but the ships and people of other neutral and friendly nations have been sunk and overwhelmed in the waters in the same way. There has been no discrimination.

The challenge is to all mankind. Each nation must decide for itself how it will meet it. The choice we make for ourselves must be made with a moderation of counsel and a temperateness of judgment befitting our character and our motives as a Nation. We must put excited feelings away. Our motive will not be revenge or the victorious assertion of the physical might of the Nation, but only the vindication of right, of human right, of which we are only a single champion.

When I addressed the Congress on the 26th of February last I thought it would suffice to assert our neutral rights with arms, our right to use the seas against unlawful interference, our right to keep our people safe against unlawful violence. But armed neutrality, it now appears, is impracticable. Because submarines are in effect outlaws, when used as German submarines have been used against merchant shipping, it is impossible to defend ships against their attacks, as the law of nations has assumed that merchantmen would defend themselves against privateers or cruisers, visible craft giving chase upon the open sea. It is common prudence in such circumstances, grim necessity indeed, to endeavor to destroy them before they have shown their intention. They must be dealt with upon sight, if dealt with at all.

The German Government denies the right of neutrals to use arms at all within the areas of the sea which it has proscribed even in the defense of rights which no modern publicist has ever before questioned their right to defend. The intimation is conveyed that armed guards which we have placed on our merchant ships will be treated as beyond the pale of law and subject to be dealt with as pirates would be. Armed neutrality is ineffectual enough at best; in such circumstances and in the face of such pretensions it is worse than ineffectual; it is likely only to produce what it was meant to prevent; it is practically certain to draw us into war without either the rights or the effectiveness of belligerents. There is one choice we cannot make, we are incapable of making; we will not choose the path of submission and suffer the most sacred rights of our nation and our people to be ignored or violated. The wrongs against which we now array ourselves are no common wrongs; they cut to the very roots of human life.

With a profound sense of the solemn and even tragical character of the step I am taking and of the grave responsibilities which it involves but in unhesitating obedience to what I deem my constitutional duty I advise that the Congress declare the recent course of the Imperial German Government to be in fact nothing less than war against the Government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it; and that it take immediate steps not only to put

the country in a more thorough state of defense, but also to exert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war.

What this will involve is clear. It will involve the utmost practicable co-operation in counsel and action with the Governments now at war with Germany, and as incident to that, the extension to those Governments of the most liberal financial credits, in order that our resources may so far as possible be added to theirs.

It will involve the organization and mobilization of all the material resources of the country to supply the materials of war and serve the incidental needs of the Nation in the most abundant and yet the most economical and efficient way possible.

It will involve the immediate full equipment of the Navy in all respects but particularly in supplying it with the best means of dealing with the enemy's submarines.

It will involve the immediate addition to the armed forces of the United States, already provided for by law in case of war, of at least 500,000 men, who should, in my opinion, be chosen upon the principle of universal liability to service, and also the authorization of subsequent additional increments of equal force so soon as they may be needed and can be handled in training.

It will involve, also, of course the granting of adequate credits to the Government, sustained, I hope, so far as they can equitably be sustained, by the present generation, by well conceived taxation.

I say sustained so far as may be equitable by taxation, because it seems to me that it would be most unwise to base the credits, which will now be necessary, entirely on money borrowed. It is our duty, I most respectfully urge, to protect our people, so far as we may, against the very serious hardships and evils which would be likely to arise out of the inflation which would be produced by vast loans.

In carrying out the measures by which these things are to be accomplished we should keep constantly in mind the wisdom of interfering as little as possible in our own preparation and in the equipment of our own military forces with the duty—for it will be a very practical duty—of supplying the nations already at war with Germany with the materials which they can obtain only from us by our assistance. They are in the field, and we should help them in every way to be effective there.

I shall take the liberty of suggesting through the several executive departments of the Government, for the consideration of your committees, measures for the accomplishment of the several objects I have mentioned. I hope that it will be your pleasure to deal with them as having been framed after very careful thought by the branch of the Government upon whom the responsibility of conducting the war and safeguarding the Nation will most directly fall.

While we do these things, these deeply momentous things, let us be very clear, and make very clear to all the world, what our

motives and our objects are. My own thought has not been driven from its habitual and normal course by the unhappy events of the last two months, and I do not believe that the thought of the Nation has been altered or clouded by them. I have exactly the same things in mind now that I had in mind when I addressed the Senate on the 22d of January last; the same that I had in mind when I addressed Congress on the 3d of February and on the 26th of February. Our object now, as then, is to vindicate the principles of peace and justice in the life of the world as against selfish and autocratic power, and to set up among the really free and self-governed peoples of the world such a concert of purpose and of action as will henceforth insure the observance of those principles.

Neutrality is no longer feasible or desirable, where the peace of the world is involved and the freedom of its peoples, and the menace to that peace and freedom lies in the existence of autocratic governments, backed by organized force which is controlled wholly by their will, not by the will of their people. We have seen the last of neutrality in such circumstances. We are at the beginning of an age in which it will be insisted that the same standards of conduct and of responsibility for wrong done shall be observed among nations and their governments that are observed among the individual citizens of civilized states.

We have no quarrel with the German people. We have no feeling toward them but one of sympathy and friendship. It was not upon their impulse that their government acted in entering the war. It was not with their previous knowledge or approval. It was a war determined upon as wars used to be determined upon in the old unhappy days, when peoples were nowhere consulted by their rulers and wars were provoked and waged in the interest of dynasties or of little groups of ambitious men who were accustomed to use their fellow men as pawns and tools.

Self-governed nations do not fill their neighbor States with spies or set the course of intrigue to bring about some critical posture of affairs which will give them an opportunity to strike and make conquest. Such designs can be successfully worked out only under cover and where no one has the right to ask questions. Cunningly contrived plans of deception or aggression, carried, it may be from generation to generation, can be worked out and kept from the light only within the privacy of courts or behind the carefully guarded confidences of a narrow and privileged class. They are happily impossible where public opinion commands and insists upon full information concerning all the nation's affairs.

A steadfast concert for peace can never be maintained except by a partisanship of democratic nations. No autocratic government could be trusted to keep faith within it or observe its covenants. It must be a league of honor, a partnership of opinion. Intrigue would eat its vitals away; the plottings of inner circles who could plan what they would, and render account to no one, would be a corruption seated at its very heart. Only free people can hold their pur-

pose and their honor steady to a common end, and prefer the interests of mankind to any narrow interest of their own.

Does not every American feel that assurance has been added to our hope for the future peace of the world by the wonderful and heartening things that have been happening within the last few weeks in Russia? Russia was known by those who knew her best to have been always in fact democratic at heart in all the vital habits of her thought; in all the intimate relationships of her people that spoke their natural instinct, their habitual attitude toward life. The autocracy that crowned the summit of her political structure, long as it had stood and terrible as was the reality of its power, was not in fact Russia in origin, character, or purpose, and now it has been shaken off and the great generous Russian people have been added, in all their native majesty and might, to the forces that are fighting for freedom of the world, for justice, and for peace. Here is a fit partner for a league of honor.

One of the things that have served to convince us that the Prussian autocracy was not and could never be our friend is that from the very outset of the present war it has filled our unsuspecting communities, and even our offices of government, with spies and set criminal intrigues everywhere afoot against our national unity of counsel, our peace within and without, our industries, and our commerce. Indeed it is now evident that its spies were here even before the war began and it is unhappily not a matter of conjecture, but a fact proven in our courts of justice, that the intrigues which have more than once come perilously near to disturbing the peace and dislocating the industries of the country, have been carried on at the instigation, with the support, and even under the personal directions of official agents of the Imperial Government accredited to the Government of the United States.

Even in checking these things and trying to extirpate them we have sought to put the most generous interpretation possible upon them because we knew that their source lay not in any hostile feeling or purpose of the German people toward us (who were, no doubt, as ignorant of them as we ourselves were), but only in the selfish designs of a Government that did what it pleased and told its people nothing. But they have played their part in serving to convince us at last that that Government entertains no real friendship for us, and means to act against our peace and security at its convenience. That it means to stir up enemies against us at our very doors, the intercepted note to the German minister at Mexico City is eloquent evidence.

We are accepting this challenge of hostile purpose because we know that in such a Government, following such methods, we can never have a friend; and that in the presence of its organized power, always lying in wait to accomplish we know not what purpose, there can be no assured security for the democratic governments of the world. We are now about to accept the gage of battle with the natural foe to liberty, and shall, if necessary, spend the whole force of the nation to check and nullify its pretensions and

its power. We are glad now that we see the facts with no veil of false pretense about them, to fight thus for the ultimate peace of the world and for the liberation of its peoples, the German peoples included; for the rights of nations, great and small, and the privilege of men everywhere to choose their way of life and of obedience.

The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty. We have no selfish ends to serve. We desire no conquests, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. We are but one of the champions of the rights of mankind. We shall be satisfied when those rights have been made as secure as the faith and the freedom of nations can make them.

Just because we fight without rancor and without selfish object, seeking nothing for ourselves, but what we shall wish to share with all free people, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for.

I have said nothing of the Governments allied with the Imperial Government of Germany because they have not made war upon us or challenged us to defend our right and our honor. The Austro-Hungarian Government has, indeed, avowed its unqualified indorsement and acceptance of the reckless and lawless submarine warfare, adopted now without disguise by the Imperial German Government, and it has therefore not been possible for this Government to receive Count Tarnowski, the ambassador recently accredited to this Government by the Imperial and Royal Government of Austria-Hungary; but that Government has not actually engaged in warfare against citizens of the United States on the seas, and I take the liberty, for the present at least, of postponing a discussion of our relations with the authorities at Vienna. We enter this war only where we are clearly forced into it because there are no other means of defending our rights.

It will be all the easier for us to conduct ourselves as belligerents in a high spirit of right and fairness because we act without animus, not with enmity toward a people or with the desire to bring any injury or disadvantage upon them, but only in armed opposition to an irresponsible Government which has thrown aside all considerations of humanity and of right and is running amuck.

We are, let me say again, the sincere friends of the German people, and shall desire nothing so much as the early re-establishment of intimate relations of mutual advantage between us, however hard it may be for them for the time being to believe that this is spoken from our hearts. We have borne with their present Government through all these bitter months because of that friendship, exercising a patience and forbearance which would otherwise have been impossible.

We shall happily still have an opportunity to prove that friend-

ship in our daily attitude and actions toward the millions of men and women of German birth and native sympathy who live among us and share our life, and we shall be proud to prove toward all who are in fact loyal to their neighbors and to the Government in the hour of test. They are most of them as true and loyal Americans as if they had never known any other fealty or allegiance. They will be prompt to stand with us in rebuking and restraining the few who may be of a different mind and purpose. If there should be disloyalty, it will be dealt with with a firm hand of stern repression; but if it lifts its head at all, it will lift it only here and there and without countenance except from a lawless and malignant few.

It is a distressing and oppressive duty, gentlemen of the Congress, which I have performed in thus addressing you. There are, it may be, many months of fiery trial and sacrifice ahead of us. It is a fearful thing to lead this great, peaceful people into war, into the most terrible and disastrous of all wars, civilization itself seeming to be in the balance.

But the right is more precious than peace, and we shall fight for the things which we have always carried nearest our hearts—for democracy, for the right of those who submit to authority to have a voice in their own Governments, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free people as shall bring peace and safety to all nations and make the world itself at last free.

To such a task we can dedicate our lives and our fortunes, everything that we are and everything that we have with the pride of those who know that the day has come when America is privileged to spend her blood and her might for the principles that gave her birth and happiness and the peace which she has treasured.

God helping her, she can do no other.

Mr. Wilson. I will now read the resolution which Congress passed on April 2, 1917:

Joint resolution declaring that a state of war exists between the Imperial German Government and the Government and the people of the United States, and making provision to prosecute the same.

Whereas, the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America, therefore

Be it resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared, and that the President be and he is authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government, to bring the conflict to a successful termination, and all the resources of the nation are hereby pledged by the Congress of the United States.

Mr. Silvers. I will read in evidence the address of the President to the Congress, January 8, 1918:

Gentlemen of the Congress: Once more, as repeatedly before, the spokesmen of the Central Empires have indicated their desire to discuss the objects of the war and the possible bases of a general peace. Parleys have been in progress at Brest-Litovsk between representatives of the Central Powers to which the attention of all the belligerents has been invited for the purpose of ascertaining whether it may be possible to extend these parleys into a general conference with regard to terms of peace and settlement. The Russian representatives presented not only a perfectly definite statement of the principles upon which they would be willing to conclude peace, but also an equally definite program of the concrete application of those principles. The representatives of the Central Powers, on their part, presented an outline of settlement, which, if much less definite, seemed susceptible of liberal interpretation until their specific program of practical terms was added. That program proposed no concessions at all either to the sovereignty of Russia or to the preference of the populations with whose fortunes it dealt, but meant, in a word, that the Central Empires were to keep every foot of territory their armed forces had occupied—every province, every city, every point of vantage—as a permanent addition to their territories and their power. It is a reasonable conjecture that the general principles of settlement which they at first suggested originated with the more liberal statesmen of Germany and Austria, the men who have begun to feel the force of their own peoples' thought and purpose, while the concrete terms of actual settlement came from the military leaders, who have no thought but to keep what they have got. The negotiations have been broken off. The Russian representatives were sincere and in earnest. They cannot entertain such proposals of conquest and domination.

The whole incident is full of significance. It is also full of perplexity. With whom are the Russian representatives dealing? For whom are the representatives of the Central Empires speaking? Are they speaking for the majorities of their respective parliaments or for the minority parties, that military and imperialistic minority which has so far dominated their whole policy and controlled the affairs of Turkey and of the Balkan States which have felt obliged to become their associates in this war? The Russian representatives have insisted, very justly, very wisely, and in the true spirit of modern democracy, that the conferences they have been holding with the Teutonic and Turkish statesmen should be held within open, not closed, doors, and all the world has been audience, as was desired. To whom have we been listening, then? To those who speak the spirit and intention of the resolutions of the German Reichstag of the 9th of July last, the spirit and intention of the liberal leaders and parties of Germany, or to those who resist and defy that spirit and intention and insist upon conquest and subjugation? Or are

we listening, in fact, to both, unreconciled and in open and hopeless contradiction? These are very serious and pregnant questions. Upon the answer to them depends the peace of the world.

But, whatever the results of the parleys at Brest-Litovsk, whatever the confusions of counsel and of purpose in the utterances of the spokesmen of the Central Empires, they have again attempted to acquaint the world with their objects in the war and have again challenged their adversaries to say what their objects are and what sort of settlement they would deem just and satisfactory. There is no good reason why that challenge should not be responded to, and responded to with the utmost candor. We did not wait for it. Not once, but again and again, we have laid our whole thought and purpose before the world, not in general terms only, but each time with sufficient definition to make it clear what sort of definitive terms of settlement must necessarily spring out of them. Within the last week Mr. Lloyd George has spoken with admirable candor and in admirable spirit for the people and Government of Great Britain. There is no confusion of counsel among the adversaries of the Central Powers, no uncertainty of principle, no vagueness of detail. The only secrecy of counsel, the only lack of fearless frankness, the only failure to make definite statements of the objects of the war, lies with Germany and her allies. The issues of life and death hang upon these definitions. No statesman who has the least conception of his responsibility ought for a moment to permit himself to continue this tragical and appalling outpouring of blood and treasure unless he is sure beyond a peradventure that the objects of the vital sacrifice are part and parcel of the very life of society and that the people for whom he speaks think them right and imperative as he does.

There is, moreover, a voice calling for these definitions of principle and of purpose which is, it seems to me, more thrilling and more compelling than any of the many moving voices with which the troubled air of the world is filled. It is the voice of the Russian people. They are prostrate and all but helpless, it would seem, before the grim power of Germany, which has hitherto known no relenting and no pity. Their power, apparently, is shattered. And yet their soul is not subservient. They will not yield either in principle or in action. Their conception of what is right, of what is humane and honorable for them to accept, has been stated with a frankness, a largeness of view, a generosity of spirit, and a universal human sympathy which must challenge the admiration of every friend of mankind; and they have refused to compound their ideals or desert others that they themselves may be safe. They call to us to say what it is that we desire, in what, if in anything, our purpose and our spirit differ from theirs; and I believe that the people of the United States would wish me to respond, with utter simplicity and frankness. Whether their present leaders believe it or not, it is our heartfelt desire and hope that some way may be opened whereby we may be privileged to assist the people of Russia to attain their utmost hope of liberty and ordered peace.

It will be our wish and purpose that the processes of peace, when they are begun, shall be absolutely open and that they shall involve and permit henceforth no secret understandings of any kind. The day of conquest and aggrandizement is gone by; so is also the day of secret covenants entered into in the interest of particular governments and likely at some unlooked-for moment to upset the peace of the world. It is this happy fact, now clear to the view of every public man whose thoughts do not still linger in an age that is dead and gone which makes it possible for every nation whose purposes are consistent with justice and the peace of the world to avow now or at any other time the objects it has in view.

We entered this war because violations of right had occurred which touched us to the quick and made the life of our own people impossible unless they were corrected and the world secured once for all against their recurrence. What we demand in this war, therefore, is nothing peculiar to ourselves. It is that the world be made fit and safe to live in; and particularly that it be made safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of justice and fair dealing by the other peoples of the world as against force and selfish aggression. All the peoples of the world are, in effect, partners in this interest, and for our own part we see very clearly that unless justice be done to others it will not be done to us. The program of the world's peace, therefore, is our program; and that program, the only possible program, as we see it, is this:

I. Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.

II. Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

III. The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

IV. Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety.

V. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

VI. The evacuation of all Russian territory and such a settlement of all questions affecting Russia as will secure the best and freest co-operation of the other nations of the world in obtaining for her an unhampered and unembarrassed opportunity for the independent determination of her own political development and national policy and assure her of a sincere welcome into the society

of free nations under institutions of her own choosing; and, more than a welcome, assistance also of every kind that she may need and may herself desire. The treatment accorded Russia by her sister nations in the months to come will be the acid test of their good will, of their comprehension of her needs as distinguished from their own interests, and of their intelligent and unselfish sympathy.

VII. Belgium, the whole world will agree, must be evacuated and restored, without any attempt to limit the sovereignty which she enjoys in common with all other free nations. No other single act will serve as this will serve to restore confidence among the nations in the laws which they have themselves set and determined for the government of their relations with one another. Without this healing act the whole structure and validity of international law is forever impaired.

VIII. All French territory should be freed and the invaded portions restored, and the wrong done to France by Prussia in 1871 in the matter of Alsace-Lorraine, which has unsettled the peace of the world for nearly fifty years, should be righted, in order that peace may once more be made secure in the interest of all.

IX. A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality.

X. The peoples of Austria-Hungary, whose place among the nations we wish to see safe-guarded and assured, should be accorded the freest opportunity of autonomous development.

XI. Roumania, Serbia and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan States to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guaranties of the political and economic independence and territorial integrity of the several Balkan States should be entered into.

XII. The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guaranties.

XIII. An independent Polish State should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.

XIV. A general association of nations must be formed under specific covenants for the purpose of affording mutual guaranties of political independence and territorial integrity to great and small states alike.

In regard to these essential rectifications of wrong and assertions of right we feel ourselves to be intimate partners of all the governments and peoples associated together against the imperialists. We

can not be separated in interest or divided in purpose. We stand together until the end.

For such arrangements and covenants we are willing to fight, and to continue to fight, until they are achieved; but only because we wish the right to prevail and desire a just and stable peace, such as can be secured only by removing the chief provocations to war, which this program does remove. We have no jealousy of German greatness, and there is nothing in this program that impairs it. We grudge her no achievement or distinction of learning or of specific enterprise such as have made her record very bright and very enviable. We do not wish to injure her or to block in any way her legitimate influence or power. We do not wish to fight her either with arms or with hostile arrangements of trade if she is willing to associate herself with us and the other peace-loving nations of the world in covenants of justice and law and fair dealing. We wish her only to accept a place of equality among the peoples of the world—the New World in which we now live—instead of a place of mastery.

Neither do we presume to suggest to her any alteration or modification of her institutions. But it is necessary, we must frankly say, and necessary as a preliminary to any intelligent dealings with her on our part, that we should know whom her spokesmen speak for when they speak to us, whether for the Reichstag majority or for the military party and the men whose creed is imperial domination.

We have spoken now, surely, in terms too concrete to admit of any further doubt or question. An evident principle runs through the whole program I have outlined. It is the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak. Unless this principle be made its foundation no part of the structure of international justice can stand. The people of the United States could act upon no other principle; and to the vindication of this principle they are ready to devote their lives, their honor, and everything that they possess. The moral climax of this, the culminating and final war for human liberty has come, and they are ready to put their own strength, their own highest purpose, their own integrity and devotion to the test.

Florence E. Gebhart. Am employed as cashier by the Ragan Grain Company; am a member of the Woman's Dining Club; was present at that meeting on March 16th and heard Mrs. Stokes' address. She said that our Food and Fuel Administration was working a camouflage, and that we were in the war for the capitalists rather than for

democracy; that the boys were not fighting for free democracy, but were only given that slogan in order to get them to go, that they were really fighting for the capitalists and for Morgan's millions. She said we would have a revolution in this country after the war, and that if the war lasted long enough we would have it during the war.

She said that in Russia everything was free, that the land there being occupied was divided and the people were going to live on it as long as they wished, or could move off whenever they were ready; that the vaults and the banks there were being broken into and the contents divided among the people to whom they rightfully belonged.

Cross-examined. The dinner began at 7 o'clock. After that a quartet of four sang two or three numbers. Mrs. Stokes began speaking about nine. I was opposed to her coming as a speaker. She spoke nearly two hours. She spoke of our industrial methods, comparing making shoes and clothing by hand, and now making them by machinery. Her reference to Bolsheviki was in reply to a question and she stated that the land had been held by the granddukes and that large amounts had been restored to the people or they had taken it. She said our people thought they were fighting for democracy. I remained until it was over. There were probably about 350 there. Do not know how many remained and shook hands with her afterwards. I did not stay for that. The Ragan Grain Company is a Board of Trade Commission Company. I told two girls next to me I thought we were very foolish to listen to any one talk like that. It did not make me disloyal. She could not make me disloyal.

May 21.

A. H. Little. I reside in Kansas City, Kansas. Am in the live stock business. Was at a

meeting of the Women's Dining Club at Baltimore Hotel last March at which Mrs. Stokes made an address. She started her speech by stating that when America first went into the war she was for it but she had had a change of heart, then she recited a piece of poetry entitled "America" that she had written and stated that she was sorry now that she had written it as the sentiments of that poem were not hers; that she believed the United States were simply forced into this war by the profiteers when they were being pinched by the war; that had this country gone into the war for democracy they would have gone in when the Lusitania was sunk or when Belgium was invaded; that in her mind it was simply a war between the profiteers of Germany and the profiteers of the other countries; that the profiteers were the ruling class in the war and that the profiteers—that is, the ruling class on one side was no better than the other. It was simply a war of profiteers. That the boys that were being brought into this fight were under a subterfuge of democracy while they were simply fighting for the war profiteers and predicted that before the war was ended they would find out they were being deceived and she prophesied a rebellion in this country against the profiteers; that if Woodrow Wilson had plunged this country into war for world democracy that his definition of world democracy was different from hers.

This is the poem that she recited, substantially as I recall it:

Mr. Silvers (reading): "America".

"Oh! America, the sons of Britain wear the uniform of the king
 The sons of France the republic's uniform,
 The sons of Russia now the sons of light
 Wear the uniform of Russia free,
 In all the allied world where soldier patriots are
 Each wears the uniform of his dear land
 But oh! America, your sons march down your avenue embarking
 for strange shores
 To fight in other lands for peoples other than their own
 With a look in their eyes no army ever had before.
 With a love in their hearts no army ever felt before
 Wearing the uniform of world democracy; that is why I love you,
 That is why I am ready to give my all to you,
 Oh! my America."

Cross-examined. I was the guest of my sister. In opening she stated that she was a Socialist. I am not and I am prejudiced against her kind, the way she spoke that night, not against Socialists; my Live Stock Commission Company is affiliated with the Stock Yards. I remember she started her speech with the talk on Socialism; which didn't particularly interest me and I couldn't repeat any of her speech, in fact I wasn't interested in her speech until she uttered what I considered disloyal statements. I knew she was a socialist before I went to the lecture. She mentioned two classes in this war; one class had one motive and the other class was being misled.

Maude B. Flowers. Am a member of the Woman's Dining Club; heard the defendant; she said no thinking person really believed that we were in this war for the sake of world democracy, that if we were sincere we would have entered the war when the neutrality of Belgium was violated, and most certainly when the Lusitania was sunk, but we did not until the U-boat became a menace to world trade,

and threatened to isolate the Allies and cut off the munitions and our over-production that we sent to the Allies, and to threaten the vast loans the capitalists had already made to the Allies; that to send our men into battle, they must have a principle to fight for, and the capitalists and the profiteers and the phrase was coined, "The world must be made safe for democracy." She said that while our men entered the war in this belief they would be undeceived finally and when they returned they would never take up life again on the old system; they would learn while they were abroad that they were not fighting for democracy but for the protection and safeguarding of Morgan's millions; when they came back, or perhaps before this country would be plunged into a revolution; that we had been drifting towards an industrial revolution for a long time and this would certainly bring it about. She said that the activities of the Red Cross, of the Food and Fuel Administration and other war-created activities, were mere war camouflage.

Cross-examined. She spoke of

her early history and her work as a girl while she was in a cigar factory and spoke of the conditions in Russia; she spoke of the conditions in this country, of the situations that developed and of labor becoming more and more highly specialized. She spoke quite at length of the Russian difficulties.

Miss Margaret De Witt asked why these more enlightened Russians did not go back to their own country and work among their own people and preach the same doctrines they preached here, and Mrs. Stokes answered they were not permitted to do so.

I am advertising manager for the Robert Keith Furniture Company.

Robert L. Dawson. Am a plumbing and heating contractor; was at the meeting of the Woman's Dining Club at the Baltimore Hotel, at which Mrs. Stokes made an address. She talked about industrial affairs of the country; said we entered the war only after our commerce had been affected by the submarines; that if we had intended to go to war for democracy we would have went into it at the time the Lusitania was sunk, and not waited until our profiteers or capitalists were being affected; that our soldiers were not fighting for democracy, they were fighting for the profiteers and the capitalists.

Cross-examined. I understood from her lecture that there were two elements in this war, those who are in it for democracy, and those who are in it to increase their profits; she was for the workers.

Mr. Stedman. Did you hear

her say in substance the following: "The men in trenches who have been freed from the economic serfdom to which some of them have been accustomed will, it is likely, return to their homes with a new view and a new impatience for mere political phrases and will demand real thinking and sincere action?" She may have said something of that sort, but I just cannot recall it.

Mr. Stedman. Do you know what I have just quoted from? No. I have quoted from Woodrow Wilson's statement to the Democrats at New Jersey.

Mr. Silvers. We object to that. He asks the witness what she stated and then volunteers the information that Woodrow Wilson said that.

The COURT. The objection will be sustained and that will be stricken out.

P. S. Dee. Reside at Parsons, Kansas; was in March last a reporter on the Kansas City Post. When Mrs. Stokes was brought back from Willow Springs I was assigned to the Stokes story; March 29th, if I am not mistaken, was the date when she was arraigned; the Court was waiting for her attorneys to appear; I sat down and talked to Mrs. Stokes about the stories that had been published in the paper and she expressed herself to me along those same lines, that the profiteering war was being run. She said the people have gone war crazy. The profiteers have gained control of the Government. The war is being operated solely and materially for the Government and unless it is stopped that these profiteers will have such a control

that after the war ends the working people will be downtrodden; that we were in this war not from purely patriotic motives, the war was controlled by the profiteers who had been called in by the administration at Washington and placed in responsible positions and were gaining such a hold on things that it would be absolutely impossible to jar them loose after the war was over; I am going to join the navy today.

Cross-examined. Am now managing editor of the *Parsons Daily Sun*. She won my sympathy, I will very readily say, by tears welling up in her eyes; she said that if I could only know the conditions under which the people in the cities had to live and how they were downtrodden by the capitalists and profiteers I would realize that this war was being prosecuted only for the benefit of the profiteers, that they were getting their hand more and more and grinding these people down and what she feared and what she was fighting was these profiteers who were prosecuting this war and that her people, the working class, would be absolutely swept away and would again be slaves.

Attie Moorman. Was at the dinner of the club in which defendant spoke. She said a great deal about capitalization and exploitation; reviewing the industrial conditions in the United States; that our government was now in the hands of capitalists and that this war was not a war for democracy as was claimed by the government; it was for capitalists to exploit weaker countries; our government had

fallen into the hands of these profiteers and this war, though claimed to be a war for world democracy, was a war for profiteers. She stated that when she witnessed the soldiers marching on Fifth Avenue in New York that she was very much moved; her heart or her eyes were filled to overflowing at seeing the poor deluded men walking down Fifth Avenue, not knowing the thing which they were doing or the motive for taking them there. That they were going there for the benefit of these profiteers only; that while she believed they were sincere in enlisting and thinking they were going to fight for democracy, in reality they were going to help the profiteers to exploit these worlds which they conquered.

Kate B. Dawson. Am a sister of Robert Dawson; am estimator of a plumbing and heating business; am a member of the Woman's Dining Club; was at the meeting last March at which Mrs. Stokes made an address. The most I got from it was that if we had gone in for democracy we would have gone in when the *Lusitania* was sunk or when they raided Belgium and not waited until they sunk our boats and stopped our commercial trade. It looked like we went for the dollar more than democracy.

Margaret De Witt. Was present at the dinner of the Woman's Dining Club; heard the defendant speak. She had given quite a preliminary talk on industrial conditions and then she spoke of her viewing the troops as they came down the Avenue in New York, and she stated

that she was thrilled and immediately wrote a poem which she now wished she could recall. She recited it in full and at the end of it there was applause. She followed by the statement that these boys who came down the avenue thought they were fighting the war for democracy but were not. They had been led into it by a slogan to make the world free for democracy but they were not fighting for democracy. They were fighting for Morgan's millions.

Some of the people left the room at that time and that caused an interruption and when she resumed she took up the point of the profiteers; that they had control of affairs and they were leading the war in that direction; that these boys when they returned would demand a new order of things and there would be a revolution. She then—some more people left the room and she brought her speech to a close by returning to her original topic and the closing up by the possible conditions of this country after the war. The close was very short.

She spoke of the Bolsheviks as having taken possession of the land and of the country and of the money in Russia and allowing the principal land holder his fair ratio such as he could till and that the rest of the land would be divided up among the Russian people, or among the people. And that their's was an ideal government, was a true and pure democracy and that they offered to the world this idea.

Another question was asked of her: if the Germans took possession of Russia, how could

Russia divide up her land? and that was answered by a flash on her part that the Bolsheviks would fight; and she again spoke of their idealism, of their purity of motive, and I asked her could she not give us in America a little credit for the same ideals, instead of making us mere followers of the dollar. Her reply to that was the point where she brought in the distinction between the people. She said a large number of the people believed they were fighting the war of democracy, but they were not; they were fighting in the interest of the capitalists and of the financiers and the profiteers. I then asked why, if Russia were in this condition, and she had come to this country and had profited by its institutions and had developed here, why she did not return to Russia and give Russia the benefit of her training. She said the President would not permit her. She said Emma Goldman had made that effort, but was not permitted, but she said, "I hope you do not class me with her." Her further statements were the restrictions placed upon her, because of these principles, and her inability to go to Russia on that account. I am a teacher in the Westport High School.

C. M. Adams. Am in the live stock commission business located at the stock yards here; was at the meeting of the Woman's Dining Club at the Baltimore Hotel at which Mrs. Stokes made an address. She stated that the United States Government did not enter this war for the interests of democracy, but for the protection of the profiteers, and if the government was

sincere in entering the war for the protection of the people and democracy, it would have entered at the time of the invasion of Belgium and the sinking of the *Lusitania*, but, as soon as it commenced to pinch the profiteers, then they declared war.

That the soldiers who had gone, or were going, to France, were led to believe they were over there for the protection of the people and democracy; that there would be a revolution in this country, after they found out they were not there for that purpose, which would be even a greater war than this, between capital and labor.

Cross-examined. She mentioned Emma Goldman being one of the greatest shining lights in her belief and only wished that she could express herself along the lines, in as good a fashion as she did. She seemed to think that capital would get the best of the poor people. And she felt alarmed over the possibilities. We were all led to believe she was going to speak on something else, but she changed her mind when she got up.

Eva J. Sullivan. Am a teacher in the Polytechnic Institute here and a member of the Woman's Dining Club; was present at their meeting last March at which the defendant made an address.

Before Mrs. Stokes arose to make her talk, the president lifted a piece of paper and said, "I will have to take care of this, because it is your money." Mrs. Stokes said, "You may not want to give it to me after you have heard my talk." After that she was introduced. She prefaced her remarks with saying that

many of us did not know she had gone back to the socialistic party, that many of us knew she had left it, but we did not know she had gone back again. She then launched into a preamble of economics with different outlines of profiteering. She spoke then of standing on Fifth Avenue and seeing the boys march down the street, that she was so stirred and so moved that she wanted to repeat the poem "America." She followed that remark with "Would that I could recall it, if not the words, the sentiment," and then she quoted the poem.

She said that the Fuel and Food Administration were simply camouflage for profiteering; that if this country was in war for democracy, why didn't we go to war when Belgium was ravished and the *Lusitania* was sunk? That this was a war of commercialism, and our boys had to be fed up to a belief that they were fighting for democracy, and, on the contrary, they were fighting to protect the profiteers and Morgan's millions.

Mrs. Stokes was paid for making that speech \$300.

Mr. Stedman. I object to that as incompetent.

Mr. Silvers. Here is a woman out here making a great talk about profiteering in connection with the war, and pretending to be here to make a speech for the benefit of the working classes and for the benefit of democracy, and to expose the corruption in the management of the war and I think it is proper to show she was paid and that she required that she be paid to come here and make that address, as bearing on her good faith.

The COURT. I do not think it is important. The objection is sustained.

Cross-examined. I opposed her coming and talking on socialism during war times. I went there because the president requested the officers of the club to be present.

Ralph B. Campbell. Am a lieutenant in the naval reserve force; was at the Woman's Dining Club at the Baltimore; heard the speech; she said she had reversed herself as being in favor of America in the war, and she was no longer in favor of the capitalist government being in the war. She mentioned the march of troops she witnessed in New York, which had given her what she described as a touch of war hysteria, and that she had written a poem which she later recited, and said she wished she could recall the sentiment of it, if not the words. There was some applause after the recital and she held up her hand to check it. She said America had not gone to war for true principles of democracy, if they had, we would have when Belgium was ravished or at the sinking of

the Lusitania, but we had not started until it was necessary to save our dollars, that our industrial system had become top-heavy and we had to protect it, and so when the capitalistic government decided to go to war it was necessary to fashion a motto which would appeal to the people and it had decided on the motto "Make the world safe for democracy."

She felt sure the magnificent young men she had seen parading in New York City would not have gone to war for the real reason, for the protection of Morgan's millions. She said, in regard to Russia, that the world did a great deal of hand-clapping when the czar was deposed, but remained silent when the real revolution took place, and she had no doubt there was a green-table agreement to freeze out Russia in economic spheres and that Russia had been stabbed with what she called "an economic stiletto." My duties here at this time are recruiting officer for the navy. Mrs. Stokes started her address with a resume of the industrial life of the world.

Mr. Stedman. State what she said. You are now giving your conclusions.

Mr. Silvers. He is stating the substance of what she said. Do you want him to use the exact words as stated.

The COURT. Lieutenant Campbell, you may state as far as you can the substance of what she stated there. The Court doesn't understand that counsel requires the explicit repetition of a long speech but the substance of various topics considered and what the subject matter was and her expressions relating to it.

Mr. Campbell. She mentioned the working conditions beginning with practically a written history; discussed the ancient guild system of workers—

Mr. Stedman. That is not what I am asking for.

The COURT. Are you asking him to attempt to repeat the speech as near as he can verbatim?

Mr. Stedman. No. No man living probably could do that outside of Lord Macaulay or perhaps Stanley Waterloo. In substance what I am asking for is the language and not conclusions.

The COURT. You may ask for anything you see fit as near as he can recall. We are not going to take up time here to have an hour's speech recited by the witness. You are at liberty to ask him about any portion of the speech you desire.

Mr. Stedman. I understand that I cannot ask this witness the substance of that address?

The COURT. I said that you could ask the substance of it but not to the extent of having him practically repeat in substance the entire speech which would amount even though not verbatim to something like an hour or more. You are at liberty to call his attention to and ask him about any portion of the speech you desire.

Mr. Stedman. I am asking for the other, because I am assuming I have a right when a portion of an address is placed in evidence to ask for it in its entirety. The Court has ruled and I am taking the exception.

Mr. Silvers. Lieutenant, one other question: Immediately following the publication of this letter did you notice any effect upon the applications for enlistment in the navy? They were lower.

The COURT. The answer will be stricken out, for it would involve so many elements that unless it can be referred to—approximately at least, to the article in question it would not be proper.

Mr. Silvers. We offer to show that the applications at the Kansas City Naval Recruiting Office during the week of the publication of this article in the paper, and Mrs. Stokes' speech, was the lowest number for enlistment that the Station has experienced since September.

The COURT. Objection sustained.

Frank D. Marlow. Am clerk of the Circuit Court at Neosho, Mo.; defendant visited Neosho in March of this year. She made a speech there in which she said the Government at Washington was controlled absolutely by the moneyed class; that she believed that President Wilson was honest and sincere, but was helpless for the reason that the Government was controlled by the profiteers or the moneyed class; that she couldn't endorse the war because it was a war for the profiteer; that freedom of the seas would mean freedom for the mil-

lionaires. She said that she couldn't advise men to fight in this war for it was a war for the profiteers.

Cross-examined. Should think two or three hundred people were present; it was held in the courtroom. She spoke for an hour. She said at the beginning of the war she, with more of the Socialists party had left it for the reason that she with them, espoused the cause of our allies. That she went into the Red Cross work and knitting and sewing for the soldiers and was brought to her senses by some-

body saying to her that she was sewing and knitting for our armies and allies, and what was she going to do with the Germans and Austrians that were being killed and wounded. She said the press was controlled by the moneyed class and we couldn't know the truth because they were told what to publish and what not to publish. She stated that there were two forces or classes in America, one who was interested in this war for democracy and the other for profits; that the Government was controlled by the profiteers. She said "Government," not "Administration," and that she had quit knitting and sewing for the Red Cross and the Allies. Did not hear her state that her last contribution to the Red Cross was shortly before and that it was \$50.

James Purcell. Am Chief Deputy U. S. Marshal; placed defendant under arrest at Willow Springs; had a conversation with her at luncheon; she said the Government was being controlled by the profiteers, that it made no difference to the common ordinary working people which side won, because in any event the capitalists would win. We arrived at Fort Scott, Kansas, at 8 in the morning. We had been tied up behind a wreck. The newspapers were full of accounts of this long range gun shooting 75 miles, at Paris, and I got a Sunday edition of the *Kansas City Star*, and returned to the drawing room—my wife was with me—I made the remark to Mrs. Stokes that it looked sort of bad for the Allies this morning, and we talked about the German of-

fensive and she said that if the conditions in this country of the common people, working people, could be alleviated or bettered by Germany winning the war, that she was for Germany.

Cross-examined. We talked about the chaotic conditions in Russia, and I said "I can point out to you the present chaotic conditions in Russia, and to my mind is a good example of what Socialism is practically," and then she said that the press accounts were not true; that they were censored to suit the people—or as the Allied Governments wanted them to be suited. After we boarded the train Mrs. Stokes expressed delight when we got in the parlor car because there happened to be a writing stand, and she said "Oh, I can write." I said "Certainly you can, write if you care to." Special Agent Dillingham met me when I arrived at Willow Springs. And the four of us went to lunch together.

S. W. Dillingham. Am in the Bureau of Investigation of the Department of Justice; met the defendant at dinner in a hotel at Willow Springs the following day after her speech.

While eating Mr. Purcell asked Mrs. Stokes who she wanted to win this war, and she said she wanted to see both Germany and the Allies defeated, and Purcell said, "Mrs. Stokes, that would be impossible." She said it made no difference, just so the working class won. I asked her, "Mrs. Stokes, you would just as soon be under the German rule as under the rule of this country?" She says, "I wouldn't put it just that way, for you know what they would

say, that I am pro-German, but I will put it this way: Under German capitalist rule or under the rule of this Government, if it is ruled by the capitalists, yes, and that is just what we have." Asked her what would be the result if you went on giving these speeches and gained followers, would the result be a revolution as you have in Russia?" She says "Yes." I says, "Is that your point then, to cause a revolution in this country?" She says "Yes." I says, "Would you like the people to be killed and murdered here like they are in Russia?" She says, "They are not doing that; they are not killing and murdering, but the aim of the Socialist party is to revolutionize the land and turn it back to the people." She said she would say it was a capitalistic war if she was to be shot tomorrow.

Cross-examined. I told her we were trained to remember speeches; have had eleven years' experience in this line of work.

Gertrude Hamilton. Am a teacher in the Kansas City schools. I was a guest at that dinner. Mrs. Stokes said this was not a war of democracy, it was a war of capital; had America gone into the war for democracy or for humanitarian reasons, we would have gone in when the neutrality of Belgium was violated, when the Lusitania was sunk, but that we did not espouse the cause of democracy until after our industrial life was interfered with by the submarine, and as soon as our trade was threatened then America be-

came the champion of democracy. She said soon after America entered the war she was in New York, and at the sight of soldiers marching, she was so thrilled that she wrote a poem; said that she was sorry she had written it and if she had the power to recall it she would do so. She said in taking up this cause of democracy the capitalists knew the mass of Americans would not fight for capital and so they hit upon the slogan, "The world for democracy," because that would appeal to the majority of Americans; that the soldiers who were now in the trenches were fighting for democracy, but that back of that was this idea of capital, really not the work of democracy, but they were fighting for Morgan's millions; that these great movements such as conservation and the Red Cross, were merely camouflage of war.

Mrs. Stokes did not quote the poem at all.

Cross-examined. She did not recite the poem there as I recall. I believe she said that she would like to recall the poem, and she said, "recall," not in the meaning of remember, but I might say as a synonym of repudiate the poem.

Captain C. E. Garrison. Am a Captain in the U. S. Army stationed at Camp Funston, Kansas; am camp intelligence officer; that issue of the *Kansas City Star* and *Times* circulated in Camp Funston among the members of the military forces of the United States.

THE WITNESSES FOR THE PRISONER.

Florence Kelley. Live in New York City; prior to that in Chicago at the Hull House, and in New York at the Henry Street Settlement; am a vice president of the conference of Social Work; it has various departments, taking in settlement work, charitable work and institutions.

I have known Rose Pastor Stokes ten years. Jane Addams is a friend of mine, we have worked together at Hull House. I know Mrs. Stokes' general reputation as a law-abiding citizen among her friends and acquaintances. It is good.

Cross-examined. Have never heard Mrs. Stokes' living according to law discussed: she is regarded as a law-abiding citizen.

Mr. Silvers. In New York there is a law which prohibits the distribution of information relative to prevention of conception of commonly called, "Birth-Control," is there not? I know there was one. Have you ever heard that in April, 1915, she

attended one of Miss Emma Goldman's meetings, in which she stated, "I have come here prepared to do just what Emma Goldman did. I am not trying for arrest, and do not speak in a spirit of defiance. I want to do what Emma Goldman did. That I am married and have a certain standing makes it—makes a difference in a way. There is nothing brave about what I want to do. I am merely honoring this law by breaking it." She distributed slips of paper amongst the audience which contained information as to birth control, and prevention of conception.

Arthur Kellogg. I am in advertising work for the *Survey*, a magazine in the field of social service. Am acquainted with Mrs. Stokes; am more particularly acquainted with some of her neighbors; her general reputation among her neighbors as a law-abiding citizen is good.

THE PRISONER'S STORY.

Rose Pastor Stokes. My name is Rose Pastor Stokes; live in New York City; born in Russia, in the city of Angustova on July 18, 1879. Lived there until I was three years old; from there I went to London, the slum portion; lived there for eight years. I made satin bows for ladies' slippers; came to the United States when I was 11 to Cleveland, Ohio; worked there wrapping cigars in the outer envelope for 12 years; from Cleveland I went to New York City; while working in Cleveland I taught some classes in English to grown up immigrants. I wrote in the evenings articles for a New York newspaper, the *Jewish Daily News*. When I went to New York I was 23; called to work on this newspaper and became assistant to the editor of the English department; did also voluntary settlement work from two to five evenings a week among the people. I was married July 18, 1905. It was reported I married a millionaire, it is not true; Mr. Stokes' family is a wealthy family, and we got the reputation of being millionaires, but we frequently denied the

report in the New York papers, and the next day they would take up the old story again until it got so hopeless that we never bothered to refute it. Was a member of the Socialist party prior to the war. I left it after we entered the war. I rejoined it. Was engaged in Red Cross work for a little while. Have contributed to it.

I did not at the meeting at the Dining Club or any other place, say the Red Cross was a camouflage. Never mentioned it. I subscribed for Liberty Bonds; first and second issues, not for the third because I was under indictment. I didn't wish to appear to try to win favor for myself on that ground. My address at the Dining Club here was a long talk. I started by saying that I was going to speak from the Socialist's point of view; that some were not aware, being guests, that I had gone back to the Socialist party, and that it might surprise them; that I would probably not be able to convince every one of my point of view, but that though we might disagree, for in every meeting there were those who disagreed with the radical viewpoint because some people were conservative, and others not so much so; still I hoped they would give me an earnest hearing, as I would earnestly give them the point of view of a great many people who held it in common with me.

I started by laying a foundation for the latter part of my address, by outlining the development of industries, from ancient slave systems, to—still more modern—slave systems; with a slavery, perhaps less objectionable than the past; chattel slavery being more objectionable than feudalism, and wage slavery of today.

Then I outlined the industrial history of the past century. I said when the steam driven tool was invented, the workers had simple hand tools that they owned because they were easily procured; that after the machinery came, driven by steam, the workers began to get crowded out of the old types of industry, which required only hand production, and I instanced this with the weaving loom, and the shoe maker who worked with the simple awl and who did his work through the week, made what he could, as his own master, and sold in exchange in the market for the things he needed of the products he had created and he was not owned by any man.

When the steam-driven machine which had displaced the hand-tool was still quite simple, it was possible to include it in a small place, even in the man's home or a small factory, not much capital was required, the man who had been able to accumulate a little capital and get that simpler machine and he became a master workman, in conjunction with others who became his workers, for machinery had not developed to the point where great aggregates of men could work together. Out of that has the technical progress of the century, the invented genius of that industrial age developed, until more complicated machines, creating still greater economies; and it was necessary, in order to control that greater machine, to have more capital to control it and men had to get together. And out of that grew the partnership in industry where two men got together to control a machine and then as the technical

progress of the age produced the still more complicated machine there arose the necessity of getting control of that, and finally, we had the corporation and after that the great trusts; that it was a development for which no man, and no group of men were responsible; it was the wonderful technical genius of our century that produced this state of things.

I said the mistake was, that the evolutionary process was not taken advantage of by the masses of the people; that the workers did not get control of the small machine and later of the more complicated machine and then the great corporate industry and then the trustified, highly developed industry. As men got to use their instincts for accumulating wealth, which is a perfectly natural instinct, those who had the money, got control of the industries, and took advantage of the new conditions to accumulate such wealth as the conditions permitted them to do.

Out of the process developed, on the one hand, a great unemployed army of men, and on the other a surplus product in industry and that this condition of unemployment, in which millions of men had gone from city to city looking for work in periods of depression, and even in normal times, by the hundred of thousands—this unemployed army was created by the very fact of evolution and the workers not having control of the whole process.

Men were eliminated from industry as fast as machines increased; as soon as the machines increased, the output of human labor was increased with less effort on the part of the men operating those machines; then the owners that had the whole industry at their command, under them, said, "If we can operate with less men, we shall have as much output with a smaller working force" and "we will reduce the working force and have as much output with a smaller payroll and so make a larger profit."

THE COURT. I must decline to let the trial be employed for the purposes of an economic lecture. There has not been a thing said up to this time that bears upon the charges.

Mr. Stedman. It is an explanation.

THE COURT. It is going into a trial of our industrial institutions without anything here to present the contrary side. It is not at all pertinent to the issues as to what this person did or thought about socialism, republicanism or democracy or any other political ideas. It is a question of what was said or done, and in what connection.

Mr. Stedman. The letter is one thing, the motive is another. The letter was offered in evidence and in five minutes that incident was closed. The motive has taken more than a day in trial. I will not take a day in replying to that motive, I will agree to take fifty per cent only. If I say war is the product of industrial conditions and that basically it is a struggle to find a place to dispose of the surplus products, then the conception that a person gets must be entirely different than a purely unqualified negative, or a clear disapproval of a course. There are people who approve of this war from entirely different motives, and it would be unfair to say that

because they differ in their motives and the reasons for bringing it about that that necessarily implies disloyalty to the government.

Where you put in portions taken out of an address, a report from the entire contents is the true criterion of motive. You can take a word or a line from any book, as for example Mark Twain's *Mysterious Stranger*, you can take ten lines of that, and it would be sufficient to send him to the penitentiary for twenty years.

The COURT. I do not want to go into any philosophical discussion. It matters not with this indictment what her motive may have been, provided she intended to do things to violate the statutes.

Mr. Stedman. I assumed that motive was an element, intent was an element and action was an element. The introduction of the evidence on the part of the government I can understand on no other theory than to show motive.

The COURT. To show intent.

Mr. Stedman. Intent is the method adopted.

The COURT. No, I may intend to do a thing honestly believing myself that I am doing the right thing, but, if it is in violation of an Act of Congress, I have committed an offense.

Mr. Stedman. Then I have misread the *Molinux* case, quoted by the Supreme Court of the United States. If I fire a revolver at a dog and miss the dog and hit a man you have the motive. What is the motive? To hit the dog. What is the intent? The *modus operandi* to which the crime is committed.

The COURT. We will not get on by this discussion. I desire to have this philosophical discussion abridged as much as possible.

Mr. Stedman. I am going to do all I can to help out.

Mrs. Stokes. I tried to show that as fast as industry became highly concentrated and more economical in its processes the surplus product grew in proportion to the development of that process; that it grew through the workers receiving in wages less than the full value of that product and they were unable to buy back for consumption, although they needed it, the things they produced. The whole people being unable to buy back for consumption, and the capitalist class, being themselves unable to consume that entire surplus, they had then to furnish market for it, and today, under very highly developed capitalist conditions, as existing here, and in other great countries, the capitalist classes feel the pressure; because, unless they get rid of it the market is glutted, and the period is called a "period of hard times," a period of industrial crisis, because the market is overloaded with products. We call it over-production in some quarters and under-consumption among the working people.

That process developed the need for new markets, created enmity, strife, diplomatic juggling of a secret sort among the capitalist groups of the various nations for whatever chances there were to seize undeveloped or under-developed countries, with resources sufficiently undeveloped to permit of capitalistic development and with peoples to exploit.

Mr. Wilson. The Government would like to know to what count in

the indictment, this testimony is admissible, so that the Government may know where it is.

The COURT. It is admissible, if at all, only on the theory that her entire speech is admissible as tending to show the connection with what she is charged as saying. Otherwise it is certainly immaterial.

Mrs. Stokes. This rivalry for markets which had to be procured if the system would be maintained, was the most basic cause for the present world war. Our war was economic because the system which produced a surplus product created the inevitable pressure for undeveloped territories and undeveloped peoples. If having conditions as they were, the war was inevitable, the United States, as other governments, entered the war from vital pressure of vital interests, no government ever declares war for purely idealistic reasons; as long as we were not affected our President tried with all his might to keep us out of the war, but just as soon as Germany renewed her submarine warfare, we had to enter the conflict, we could not escape it; and therefore, I did not agree with the St. Louis platform and left the party because I disagreed with them in calling our entry into the war the greatest crime in history; but in the main they were right in that they contended that at bottom, the war was economic and was a war for markets. I further said that old governments do not enter war on purely idealistic reasons; peoples on the contrary always went to war because of an ideal, in their idealistic natures; and when President Wilson uttered the great watch-word, "We will make the world safe for democracy", the people arose to answer that call, and I said we could not get a baker's dozen if we had called out, "Come on, and fight for Morgan's dollars."

I said I had two brothers in the service, one in the army and one in the navy. I had persuaded my good mother, who hates war so she would not have her boy go into the army so finally she let him enter the navy and he is there now.

I said I was not opposed to the war, as it was here and we could not stop it. I did not love war any more than you; we are not going to war because we love war. I do not believe even the military people fight because they want to fight. We entered the war because we had to, and the best we can do today is to explain the causes that created it, if we know what they are, in order that wars in the future may be eliminated. I did not say throughout the entire address that I was opposed to the war. I spoke of the men marching down the avenue and thrilling me until I was filled with the war spirit and felt that we were ready to march ourselves and get into the trenches and fight. I said later, when I realized there was a group of men in our country and other countries who were working at cross-purposes and trying to destroy the ideals of democracy, and to make for themselves a selfish profit out of the war, I felt sorry I had been so overcome with the desire to rush into the trenches myself, and for those men that they did not realize those things too.

I never said our men were befooled, I said our men answered the call for democracy, believing they were fighting for democracy and when if they found the things they fought for were not gained, that undoubtedly we should have both an industrial and social revolution in this country. Afterwards I had a call for questions, there was no disturbances except that four or five persons walked out, which is true in almost every meeting in which I have been.

One question that was asked me was this: "Do I approve of the social revolution in Russia?" I said I approved of the ideal for which Russia was striving, and of the ideals of the Bolsheviks, that I knew them to be honest, sincere socialists who were working in the interests of the people, that they were socializing land and industry in Russia as fast as these could be socialized and naturally there is always in great political, social or economic changes, some distress, but that the newspapers through the strict censorship, had not given us the truth about Russia, and through sources of information that I had, coming through such men as Colonel Thompson, of the Red Cross, Lincoln Steffens, recently returned from Russia, I had a different impression, and that President Wilson himself had heartily supported the ideas and aims of the Russian revolution.

The next question was, did I approve of the taking from the banks the money of Russia? I said I did not know how much truth there was in this confiscation of wealth in Russia, but if they felt it necessary to take over wealth just as here, when we take over great aggregations of wealth for the common good, perhaps it was right and I would approve of it if I felt it was in the interests of the whole people to socialize wealth.

Another question was why I did not go back to Russia if I felt that conditions were not just here. Why don't those who have developed power and gained comforts and wealth here, who were not born in this country, if they do not like it and our institutions, return to their own countries. I said I was very eager to go to Russia when the revolution took place because I did want to be helpful. I had asked to go over but that I was not permitted and I instanced Emma Goldman and Mr. Bergman, when they were first arrested and charged with certain violations of the law, were threatened by the authorities that they would be deported to Russia. This was before the revolution, before the czar had been deposed. When later they were about to be tried and the revolution had occurred, they asked to be sent back but the authorities refused to permit them to return. I said you refer to me and ask why I, who have developed in this country and have grown up here to wealth and power and intelligence, why I should criticize—why I do not go back? I will tell you why. There is justice in my criticism of these institutions. I came here when I was eleven; wanted to go to school but was put into a factory. My father worked very hard and yet did not earn enough to meet the needs of his growing family. I was the oldest of seven. I was ten years old when the next oldest came; the other six were all little ones; as I became grown up, the great part of the burden of supporting the family fell upon me. For ten years I

worked and produced things necessary for the people of this country and all those years I was half starved; I never had enough to eat or a decent bed to sleep in. I was half naked. In winter I never had a warm coat. In the summer I never had a vacation. For twelve years, for six days in the week and sometimes seven, and sometimes the whole season at a time, I worked at night in order to help out the family existence. I worked at doing useful work and never had enough. But the moment I left the useful, producing class, I became a part of the capitalistic class which did not have to do any productive work in order to exist, I had all the leisure I wanted, all the vacations I wanted, all the clothes I wanted, everything I wanted was mine without having to do any labor in return for all I have received. And I said, "Madam, do you think that conditions which can produce such an example as I now cite to you are conditions that are not worthy of criticism? Do you think that such conditions are just?" And she shook her head and said, "No".

That practically was the end of my speech.

Mr. Stedman. Did you refer to the profiteers and what is the basis for your reference? I based it on the——

Mr. Silver. I object to the basis.

The COURT. Of course any testimony except that of sworn witnesses, cannot be received in proof of the fact, but she may testify as to what she relied upon in support of her view. This is with reference entirely to the third count.

Mrs. Stokes. The first was Mr. Woodrow Wilson's book "The New Freedom", the second was a report by the chairman of the War Finance Committee.

Mr. Silvers. I make objection to this testimony.

The COURT. The question is a distinction between the government and the administrative officers, and in view of that contention where a statement is charged, as in the third count, and where a bold statement is counted upon then it must be a statement that the defendant believed to be true and that being the case, as bearing upon her intent, this evidence is admitted.

Mrs. Stokes. In this report the American Committee for War Finance, it is stated that 280 members compose the National Defense Committee, 33 of these have been members of corporations that reported in the last year—our war year—who have made \$1,200,000,000 in profits. In 1916, the Central Leather Company made a profit of over fifteen millions, and in 1917 their profits are over forty-two millions. There is the United States Steel Corporation. In 1916 their profits were 171 millions, and in 1917 the profits would be 550 millions. In 1916, the Republic Iron & Steel Company netted nearly fifteen million dollars, in 1917, it had netted over twenty-two million. In 1913, the price of billets at Pittsburg was \$26.50. In 1916, \$42.00. The middle of 1917 it was \$100. In 1913 plates, Pittsburg plates, were \$33.60; in 1916, \$73 and in 1917, \$200. The labor charge from 1913 to 1916 went up in that industry only 27 per cent, while the price of billets went up 50 per cent, and the price of plates 117 per cent. In 1913 for every dollar that went

to an employe in that company, one went to the company. In 1916 for every dollar that went to an employe \$3.34 went to the company. Within eleven weeks after America declared war, steel producers advanced the price of billets \$25, an amount equal to the total price of billets four years previously.

The American Woolen Company's profits for the year ending December, 1917, were \$15,689,095, as compared with \$8,210,861, in 1916, and the Government advanced in cash on orders, \$16,400,000, gains of nearly 100 per cent. In 1917 the war profits over normal were \$13,910,187. The American Steel Foundries Company, after deducting reserve for the war excess profits and income taxes, the profits for 1917 exceeded those of 1916 by over 70 per cent. American Sugar Refining Company, capitalized at 90 million dollars, divided into common, 45 million, and preferred 45 million, for the year ending December 31, 1917, it increased its cash assets \$40,493,251.00. The Baldwin Locomotive Works, their dividend in 1916 compared with this company's reported net earnings in 1917, was 1916, 6.1 per cent; in 1917, 59.11 per cent per share. The National Union Coal Company at Ward, Iowa, was selling 100 tons of coal daily to the Government at Camp Dodge at a price 50 per cent greater than it was charging for the 150 tons of the same kind of coal, delivered daily to the Burlington Railroad Company, and the coal operators' profits now aggregate one million dollars a day. Inland Steel Company. On 53 million dollars gross, the Company's net income and their profits is \$21,340,783, and after paying the taxes, including the war taxes, the surplus was \$10,365,787, or 20 per cent of the gross.

Interstate Iron and Steel Company, for the year ending December 31, 1917, after paying dividend on preferred stock and all war and other taxes, earned for the common stock 24.07 per cent to ten per cent. Sears, Roebuck & Company: their report for the year ending December 31, 1917, and after charging off taxes and excess war profits, the net is equal to 18, and a little over 18 per cent on 75 million dollars common stock, after providing for preferred dividends, and compares to 26.5 per cent earned on 60 million dollars common stock last year. Net would have amounted to 22.6 per cent on last year's common.

In September, 1917, the steel manufacturers were making an average profit of 100 per cent. Steel now costs \$34 to produce, and it is selling for approximately \$160. Swift & Company distributed a stock dividend of 25 million dollars; profits in 1917 were \$34,650,000.

Armour & Company, in 1913, \$6,228,197, and in 1917, 21 million dollars, while Morris & Company in 1913 had \$1,916,917 in dividends—in profits, and in 1917, \$10,338,489, and Cudahy, I think that is the way the word is pronounced, Cudahy & Company in 1913 their profits were negligible, while in 1917 they made a profit of \$4,300,000.

Mr. Wilson. When did you make that compilation? When I returned home. I want to know what she means when she returned home and from where. If she has got this table up for purposes

of this case and this was gotten up after she made that speech it is not competent.

The COURT. What the witness says is a resume of what she from time to time has read from these sources or other sources, and from it she made up her mind, irrespective of its truth or falsity, that it was true.

Mr. Wilson. I contend it is not admissible. If she made it up since she made that speech up.

Mr. Stedman. Would you want us to bring in a barrel of clip-pings?

The COURT. I think from the point of view from which we have permitted this testimony to go in, it will be allowed to stand.

Mr. Stedman. Did you state that you wish to recall the sentiment of the poem? I did not. Did you state that you wanted Germany to win the war? I did not. Did you criticize President Wilson's attitude? Towards the war? No. You state that your information of the control of a commercial interest in the war was based upon reports you had read of commercial situations and also from Mr. Wilson's book "The New Freedom?" Decidedly. Were there some particular passages to which you had reference? There were.

Mr. Stedman. I am going to offer portions of this in evidence.

The COURT. I shall have to have referred to me such parts of it as you desire to offer.

Mr. Stedman. Page 10, first, I think there is four lines there; page 15 and then page 18, 24, 25, and 26, 28 and 35.

Mr. Wilson. We have no objection to the passages to which he has referred.

Mr. Stedman. I will read these passages now:

"So what we have to discuss is, not wrongs which individuals intentionally do, I do not believe there are a great many of those, but the wrongs of a system. I want to record my protest against any discussion of this matter which would seem to indicate that there are bodies of our fellow-citizens who are trying to grind us down and do us injustice. There are some men of that sort. I don't know how they sleep o' nights, but there are men of that kind. Thank God, they are not numerous. The truth is, we are all caught in a great economic system which is heartless."

"American industry is not free, as once it was free; American enterprise is not free; the man with only a little capital is finding it harder to get into the field, more and more impossible to compete with the big fellow. Why? Because the laws of this country do not prevent the strong from crushing the weak. That is the reason, and because the strong have crushed the weak the strong dominate the industry and the economic life of this country."

"There has come over the land that un-American set of conditions which enables a small number of men who control the Government to get favors from the Government; by those favors to exclude their fellows from equal business opportunity; by those favors to extend a network of control that will presently dominate every industry in the country," . . .

"I speak, for the moment, of the control over the Government exercised by Big Business. Behind the whole subject, of course, is the truth that, in the new order, government and business must be associated closely. But that association is at present of a nature absolutely intolerable; the precedence is wrong, the association is upside down. Our Government has been for the past few years under the control of heads of great allied corporations with special interests. It has not controlled these interests and assigned them a proper place in the whole system of business; it has submitted itself to their control."

"Nevertheless, it is an intolerable thing that the Government of the republic should have got so far out of the hands of the people; should have been captured by interests which are special and not general."

"We know that something intervenes between the people of the United States and the control of their own affairs at Washington. It is not the people who have been ruling there of late."

"The Government, which was designed for the people, has got into the hands of bosses and their employers, the special interests. An invisible empire has been set up above the forms of democracy."

"Who have been consulted when important measures of Government, like tariff acts, and currency acts, and railroad acts, were under consideration? The people whom the tariff chiefly affects, the people for whom the currency is supposed to exist, the people who pay the duties and ride on the railroads? Oh, no! What do they know about such matters? The gentlemen whose ideas have been sought are the big manufacturers, the bankers, and the heads of the great railroad combinations. The masters of the Government of the United States are the combined capitalists and manufacturers of the United States."

"Suppose you go to Washington and try to get at your Government. You will always find that while you are politely listened to, the men really consulted are the men who have the biggest stake, the big bankers, the big manufacturers, the big masters of commerce, the heads of railroad corporations and of steamship corporations. I have no objection to these men being consulted, because they also, though they do not themselves seem to admit it, are part of the people of the United States."

"The special interests have grown up. They have grown up by processes which at last, happily, we are beginning to understand. And, having grown up, having occupied the seats of greatest advantage nearest the ear of those who are conducting Government, having contributed the money which was necessary to the elections, and therefore having been kindly thought of after elections, there has closed around the Government of the United States a very interesting, a very able, a very aggressive coterie of gentlemen who are most definite and explicit in their ideas as to what they want.

They don't have to consult us as to what they want. They don't have to report to anybody. They know their plans and therefore they know what will be convenient for them. It may be that they

have really thought what they have said they thought; it may be that they know so little of the history of economic development and of the interests of the United States as to believe that their leadership is indispensable for our prosperity and development. I don't have to prove that they believe that, because they themselves admit it. I have heard them admit it on many occasions."

"That is what I mean when I say 'Bring the Government back to the people.' I do not mean anything demagogic; I do not mean to talk as if we wanted a great mass of men to rush in and destroy something. That is not the idea. I want the people to come in and take possession of their own premises; for I hold that the Government belongs to the people, and that they have a right to that intimate access to it which will determine every turn of its policy."

"I tell you, the so-called radicalism of our times is simply the effort of nature to release the general energies of our people. This great American people is at bottom just, virtuous, and hopeful; the roots of its being are in the soil of what is lovely, pure, and of good report, and the need of the hour is just that radicalism that will clear a way for the realization of the aspirations of a sturdy race."

"Congress has become an institution which does its work in the privacy of committee rooms and not on the floor of the Chamber; a body that makes laws, a legislature; not a body that debates, not a parliament. Party conventions afford little or no opportunity for discussion; platforms are privately manufactured and adopted with a whoop. It is partly because citizens have foregone the taking of counsel together that the unholy alliances of bosses and Big Business have been able to assume to govern for us."

"If I wanted to make a special rate on a special thing, all I should have to do is to put it in a special class in the freight classification, and the trick is done. And when you reflect that the twenty-four men who control the United States Steel Corporation, for example, are either presidents or vice-presidents or directors of 55 per cent of the railways of the United States, reckoning by the valuation of those railroads, and the amount of their stock and bonds, you know just how close the whole thing is knitted together in our industrial system, and how great the temptation is."

"I do not want to see the special interests of the United States take care of the workingmen, women, and children. I want to see justice, righteousness, fairness and humanity displayed in all the laws of the United States, and I do not want any power to intervene between the people and their Government. Justice is what we want, not patronage and condescension and pitiful helpfulness. The trusts are our masters now, but I for one do not care to live in a country called free even under kind masters. I prefer to live under no masters at all."

"There is hardly a part of the United States where men are not aware that secret private purposes and interests have been running the Government."

"With our present methods of machine nomination and our present methods of election, which give us nothing more than a choice between one set of machine nominees and another, we do not get representative government at all—at least not government representative of the people, but merely government representative of political managers who serve their own interests and the interests of those with whom they find it profitable to establish partnerships.

"Obviously, this is something that goes to the root of the whole matter. Back of all reform lies the method of getting it. Back of the question, What do you want, lies the question, the fundamental question of all government, How are you going to get it"?

"I believe in human liberty as I believe in the wine of life. There is no salvation for men in the pitiful condescensions of industrial masters. Guardians have no place in a land of freemen. Prosperity guaranteed by trustees has no prospect of endurance. Monopoly means the atrophy of enterprise. If monopoly persists, monopoly will always sit at the helm of the Government. I do not expect to see monopoly restrain itself. If there are men in this country big enough to own the Government of the United States, they are going to own it; what we have to determine now is whether we are big enough, whether we are men enough, whether we are free enough, to take possession again of the Government which is our own."

"Until finally, a generation or two from now, the scaffolding will be taken away, and there will be the family in a great building whose noble architecture will be at last disclosed, where men can live as a single community, co-operative as in a perfected, co-ordinated bee-hive, not afraid of any storm of nature, not afraid of any artificial storm."

Mr. Stedman. There may be some that I may refer to later that I overlooked. I want to read the dedication. "I dedicate, with all my heart, to every man or woman who may derive from it, in however small a degree, the impulse of unselfish public service."

It is understood this is written by the President.

I am going to offer passages from "What is Constitutional Government" by Woodrow Wilson, published in 1908 on the definitions of government.

The Court. Mr. District Attorney, is there any contention that the term "government" is not sometimes used to represent the organized state and sometimes to represent the administration temporarily administering the affairs of government?

Mr. Wilson. There will be no such contention on the part of the Government.

The Court. Then I take it that need not be proven and I take it the question is the sense in which the defendant used the term.

Mrs. Stokes. In Neosho I did not say I wanted the Allies defeated, or make that statement to any person on the train or otherwise. When I used the term "revolution", I meant in the dictionary sense a fundamental change in our industrial social conditions. When I spoke of industrial and social revolution, I meant a change

from one system of industrial and social life to another. I did not say I wished I could recall the boys out of the war. At Neosho I did not say that the President was not sincere. I have never used such language of the President. On the contrary I want to add he is always sincere.

May 22.

Mrs. Stokes. After I was brought back to Kansas City, Mr. Purcell who reported that conversation came and sat beside me and we talked about the conditions in the war and I told him something of what I knew and said that if the whole country knew what they were, there would be a change, but the people in the main just now are so war mad that they do not see all of the elements that are influencing this war, that if they understood how much wealth was being extracted from them by the profiteers, if they knew what elements there were making for a peace other than democratic that they would prevent a non-democratic outcome of the war.

Mr. Stedman. Did you, in signing and sending the letter to the Kansas City *Star-Times*, intend or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States? No. Did you intend to obstruct the recruiting and enlistment service of the United States? No. Was the statement therein wilfully and knowingly false? No.

Cross-examined. I have been a socialist all my life. I believe in the international solidarity of the people. I affiliated myself with the socialist party years ago in Cleveland. I drifted out of the party in Cleveland, shortly after joining because I did not find much, being very young, I did not understand. I formally left the socialist party last summer after the adoption by the party of the war resolution, which I could not agree with. The party since that time has not adopted any additional or new platform. The principles I entertained prior to my leaving the party are still entertained by me. I believe in the American—in the nation—as exemplified in the people. And not as exemplified in groups who control the destinies of the people.

Mr. Silvers. Do you believe in patriotism as defined in Webster's Dictionary as the love and adoration for one's country. I love America. More and above love and adoration for any other country? I love all countries. You are not willing then to tell the jury that you did and do believe in patriotism in that sense? Not completely in that sense, no. You made a speech last year at the city of Minneapolis. Yes. And you afterwards sold a transcript of it for publication to the Century Magazine. Yes. Did you say this in that speech "This is an historic moment in my life. This is my first time in my twenty-seven years in America that I have stood upon any platform as an American citizen. I have always repudiated America. I have always looked upon America as among the most oppressive of nations." Did you say that? I did. You haven't done any Red Cross work since the American soldiers have been in France? I don't believe I have. Reverting again to your attitude toward America and your feeling or lack of feeling of

patriotism, did you say in that speech: "I used to think that a country which contained institutions that inevitably tended to reward productive service with poverty and insecurity, and non-productive activity with wealth and power, was a country not worth calling one's own, or fighting for. Upon this theory I based my opposition to patriotism and nationalism. I would not rise to the national anthem. I would not salute the Stars and Stripes. It is not easy to remain seated when everybody is asking as loudly and clearly as eyes and faces can ask why you refuse to honor your country, but if I had to choose between rising or being stood up against the wall and shot, I would perforce have had to choose the latter, so deep-rooted was my feeling." Yes.

Mr. Silvers. What was your object in wishing to make a tour of the state and speak about the war? To bring the people to a realization that unless we who are left at home fight for democracy where we are, the boys in the trenches may come home and find they had not gained what they wanted. Did you not say, "It gives me a chance to make clear the class character of the struggle and to clear a way for other workers the illusion that this is a war for democracy by governments interested in democracy"? Yes. When you said at Willow Springs, "I know President Wilson, I know other men in Washington who are close to the President, are men of large vision, men of deep love for the people and I am heartily in accord with them"; you were talking about the administration, were you not? I was talking of some of the men in the administration. "I admire Wilson, but I do not go about talking of it because I do not trust the Government to conserve the interests of the people. The Government conserves the interests of the profiteers. We are for the people, against the profiteers. I cannot support a government on that basis." Did you say that? Yes, I cannot support a government on that basis. As to my letter to the *Star* I went to the stenographer and dictated it and did not stop to post it, because I did not have the time. I signed it without reading it and gave it to a bell boy to post and rushed off to meet Miss Reinecke. My one thought was, "Here was an incorrect statement, which it was my duty to correct."

Mr. Silvers. When you dictated this letter in the Baltimore Hotel were you accompanied by any other lady? Yes. Did the other lady say "Why, Rose, I was surprised when I read you were for the Government,"—I mean for the war—that while she was at Houston, Texas, recently, she was talking to a soldier whose name she did not state, and this soldier cautioned her (that is the lady with you) to be careful and not talk too loud and to be careful what she said, some one might be listening; and in reply to that you stated, "That is just it, they are afraid; they are practically forced into it?" I did not.

Mr. Silvers. Gentlemen, I will read the *Century* article now.

THE CENTURY ARTICLE

This is an historic moment in my life. This is the first time in the twenty-seven years of my life in America that I have stood upon any platform as an American. They say that confession is

good for the soul. I mean to make confession here tonight. I have always repudiated America. I have always looked upon America as among the most oppressive of nations. I have, therefore, taken a long leap indeed, to come to my present position.

Like thousnads upon thousands of immigrants to this country, I have suffered poverty, hunger, nakedness; I have borne the burdens attendant upon too much work and too little pay, and I have seen like burdens weighing the shoulders and breaking the backs of most of the men and women and boys and girls in my workaday world. This I have conceived to be—America! But I have come to recognize that the monster which oppresses equally the American citizen and the alien immigrant is not *America* but Capitalism—peculiar to no country, eating at the heart of each—citizen-sinister of the world!

America? America, as I now conceive her, stands among the free nations of the world, eager to follow where Liberty beckons, eager to fight for a newer, better world, burning to strike a blow at injustice and oppression wherever these may raise their heads—inevitably tended to reward productive service with poverty and whether they appear in the guise of German autocracy abroad or special privilege at home.

I used to think that a country which contained institutions that insecurity, and non-productive activity with wealth and power, was a country not worth calling one's own or fighting for. Upon this theory I based my opposition to patriotism and nationalism. I would not rise to the National Anthem; I would not salute the Stars and Stripes. It is not easy to remain seated when everybody is asking as loudly and clearly as eyes and faces can ask, why *you* refuse to honor your country. But if I had had to choose between rising or being stood up against the wall and shot, I would perforce have had to choose the latter, so deep rooted was my feeling.

I am a Socialist, and, of course, an Internationalist. But I have misconceived in the past, both my socialism and my internationalism, as tens of thousands of Socialists in this country are doing today. Socialism recognizes democratic rule, and it recognizes by enunciating the principles of inter-nationalism, the existence, and the need for the existence of nationalism; yet I have been taught in the Socialist movement, as I suppose many of you have been, that inter-nationalism repudiates the national idea. I have come to recognize this as an absolutely fictitious doctrine, and one that the socialist movement, if it would be true to its own principles, must at once discard.

It was my very internationalism that made a nationalist of me. When President Wilson uttered the great watchword of the struggle—the word that sent a thrill through the very heart of every democratic nation in the world, I became an American. No narrow nationalism could have moved me one inch from my old position. It was only when our President, and the American people behind him, stood where the socialist party of this country should have stood, that I became an American.

In the early days of the war, I was caught red-handed by a radical friend of mine, a woman long identified with the most extreme wing of the labor movement—the I. W. W. I was caught red-handed, with a grey wool, knitting for the Allies. Early in the war I had decided that the cause of the Allies was the better cause. I was not moralizing over the issues. I was not trying to tell myself who was right and who was wrong, who started it and who should be punished. I saw then, as I see now the economic causes that precipitated the world war; but I recognized that there was a better and a worse side, in terms of human progress, and that the defeat of the Hohenzollern Dynasty rather than the Allies was better for humanity. My friend was astonished to see the wool and knitting needles and my own busy fingers. "Why, Rose Pastor Stokes, what are you doing?" "Knitting for the Allies", I answered. "You are! Well, can you explain how you, an international socialist, pledged to the cause of the working people of the world, can do this thing when you know that there are workmen in all the opposing trenches, destroying each other?" "I think I can", I answered, "and to your satisfaction and by arguing from your own ground! "You are an I. W. W. because you hold that certain principles of organization would further the cause of labor faster than certain other principles that obtain in the organized labor movement today. Is it not so? "Well, when in your struggle for what you conceive to be the best interests of the workers, you confront workers who not only will not accept your principles, but uphold opposing ones, do you ask yourself if they are workers before you determine to fight them? Are you not in the fight to destroy the American Federation of Labor in your struggle for the Industrial Workers of the World—all because you have a conviction that this would be for the best interests of the working class?"

"Well, I am convinced that the workers in the trenches of the Allies are fighting for an international principle as important and vital to labor as any principle that has ever been fought for."

"But," argued my friend "the workers and Socialists of Germany have no quarrel with the workers and Socialists of the Allies, and you belong to the International!"

"Listen", I said. "When I am on strike with my fellowworkers against great industrial abuses, I am well aware that scabs belong to the working-class, but the logic of conditions forces me to fight those fellow workers. I understand every aspect of the economic environment that makes a scab what he is. I know the hunger, I know the poverty, I know the pressure brought to bear upon him by the scab-supplying industry specially organized to undermine the standards of organized labor, by importing scabs into strike areas. I am therefore sorry for the scab. In a general way I sympathize with his condition. It is not necessary for me to hate him in order to fight him with determination. I repeat, the logic of conditions determines me.

"Similarly, it is not essential that I should hate the German Socialist or the German organized worker to fight him. I may

understand all the forces that drew him into the struggle on the side of the great autocrat of the world; all the pressure that was brought to bear upon him to make him yield his manhood to the Hohenzollerns and to strike against the freer workers of the world; but, as in smaller strike, so in this world strike, it is my business to defeat that scab!" My friend was answered. She admitted she was answered.

President Wilson and the American people who made it their business to defeat that scab, are truer Socialists today (and it is a Socialist who says it!) than the American Socialist Party that has made a scrap of paper of its own international program!

I didn't mean to say so much. I would only add this.

All is forgotten between the scab and the organized worker when the scab repents of his ways and takes out a union card. When the workers and socialists of Germany repudiate the Hohenzollerns and join the union of the politically freer nations, we shall joyfully hail them as brothers in the great common cause of world union. Until that day comes, the logic of conditions forces us to fight the scab. Therefore God speed the day!

I will close with a bit of *vers libre* that I was moved to write on the train out here to express my new-found Americanism of which I am proud and glad these days. (See *ante*, p. 810.)

Mr. Silvers. You say in this speech that in the early days of the war you were caught "red-handed with grey wool knitting for the Allies". I understand knitting for the Allies on your part ceased when America entered the war. It did not. But you had stopped doing any Red Cross work? Yes. In this state, did you quote this poem, America, in any of your speeches, as expressive of your sentiments? Nowhere except in Kansas City. Did you recite it at the Baltimore Hotel. Yes. Did you in your speeches here in Missouri, make this statement, "It is only when our President, with the American people behind him, stood where the Socialist party of this country should have stood, I became an American?" Yes.

Mr. Silvers. This speech I have read was delivered at Minneapolis prior to your coming back to the Socialist party was it not? Yes. And it was submitted to the *Century Magazine* for publication prior to your communication with Mr. Garver in which you told him that your speech "Why I Came Back to the Socialist Party", gives me a chance to make clear the class character of the people and to clear away for other workers the illusions that this is a war for Democracy by governments interested in Democracy. Yes.

Dr. Eva Harding. Live at Topeka, Kansas, am a Homeopathic physician. Was at the Baltimore Hotel the 15th of March and at the meeting addressed by Mrs. Stokes. Her subject was "After the War,

What?" She told us that after the war we would not be fighting Germany and Austria, but the invisible government of all of the governments of Austria and Germany and Russia and America and it would be this gentle-

men's agreement that would be against the people and unless the soldiers and people were ready for this industrial upheaval after the war we would be in worse slavery than we had ever been. The packers were contending with each other for control of this country and got together and formed a trust to exploit the people; that they had built up this big packing industry that reached out all over the world and it had taken on everything and this same invisible government that the packers had made must be prepared for; that it didn't get hold of the industries of the people and take from us our chance of earning a living, and the worker, a moderate return from his work.

She said as far as the war was for Democracy, she was for it, but that after the world had been freed for Democracy and the seas were open and the trade was open, then would come our worst time.

Cross-examined. I was arrested, tried and acquitted of opposing the draft.

I was interested in what she said about the starving children in New York, and what we would face after the war and in the Bolshevik Government in Russia. She said it was a revolution, and those people were doing the best they knew how. They were a simple, pure-minded people, and in the end it would come out all right; that we didn't always get a truthful report of those conditions and we would have to trust them as to dividing the money in the strong-boxes and banks of Russia. She said it was impossible to know what was going on in Russia. She

did not in specific terms disapprove. Am certain she did not say "I would like to recall having written that poem." Didn't hear her say they were fighting for Morgan's millions. Heard her say our people would not fight for dollars and they had to create a slogan "To Make the World Safe for Democracy." That when they came back—when they went to fight for better democracy, then they would not be satisfied with what they found here. That the Bolshevik Government was the ideal government. She said we don't know anything about the movement in Russia, because we only have garbled, censored news reports, but what we do get sounds good.

In my mind, I was arrested purely and simply because I was a Socialist. It was politics that arrested me and acquitted me.

Luella Z. Rummel. Was at the meeting of the Women's Dining Club; recall what the speaker said with reference to the war, and profiteers. I remember this one thought which I carried away with me, that if this war had been declared for idealistic democracy it would have been declared immediately after the invasion of Belgium, or after the sinking of the Lusitania. That it had to be delayed until the people would come together for the special slogan of democracy, and until the moneyed interests were sufficiently ready to back up the war.

Rosa M. Hibbard. I am librarian of the Medical Library. Was present at the dinner on March 16th. Can not relate substantially what she said with reference to the war, and profi-

teers. It was a Socialist speech in regard to the condition of economics and industry, and an arraignment against capital control in the administration, and profiteering. Did not hear any remarks against the President or his policy or any language of a seditious character used by her.

Mr. Stedman. Did you hear her make any disloyal remarks?

Mr. Wilson. That is a question of opinion, pure and simple, and we object to it.

THE COURT. Objection sustained.

Stella Frances Jenkins. I am a teacher. Attended the meeting addressed by Mrs. Stokes. I understood in substance, the speaker to say that if there were any profiteering, that it would not be in harmony with our being in war for democracy; recall her reading that poem that she regretted having written if the conditions after the war would not correspond to the spirit in which the poem was written.

Eleanor Miller. I am manager of the Women's Department of the New England National bank. I think Mrs. Stokes' recitation of her speech yesterday was as near what I could recall as could be given. What impressed me most was her explanation of the war at large—that is, the causes of the big war, the over-industrialism, the over-capitalization, and the over-population.

Mary J. Lower. Am a physician; graduated in osteopathy; attended the meeting addressed by Mrs. Stokes. The only thing I remember about profiteers was that while she was among the rank of the people who produced she had nothing she wanted and that after she had ceased to be

among the number of producers and joined the rank of those who did not work, she had everything she wanted. With reference to the war and its causes I cannot really tell you just what she said. The idea I got was that the war was not declared or brought about until all of the conditions were brought to bear and harmonized with the ideals of war. She did not, however, say anything that would indicate that we would not come out of this war realizing our ideal. Did not hear her mention the Red Cross.

Cross-examined. If she had mentioned the Red Cross I think I would have heard it because I am very much interested in the Red Cross. Any reference to the Food and Coal conservation I think I should have recalled it had there been anything said about it. It did not weigh on me. She recited a poem entitled "America". When she concluded there was applause. She did not say that our soldiers were sent to France to fight for Morgan's millions or the Bolshevik government. She said they were fighting for ideals.

Eleanor Miller, Stella Frances Jenkins and Luella Z. Rummel, all recalled, testified that the defendant in her address did not mention the Red Cross.

E. Blanche Reinecke. Am a photographer. Was president of Woman's Dining Club March 16th. The meeting at which Mrs. Stokes spoke I presided. I sat directly at her left. I did not hear her say the Red Cross was a camouflage. I might not have caught it had she said it, because I was interested in other things. With reference to profiteering and war she said when the sol-

diers came down Fifth Avenue, she was wonderfully impressed with their fine faces, that they were fine young men, and that she was moved to write this poem and that it affected her greatly. She said these soldiers were in the trenches, fighting for world democracy, but she felt capital had sent them there using "world democracy" as a camouflage to make them fight for their interests.

Cross-examined. The first part of her address I think I heard pretty well, but the latter part I was interested in other things and might not have given good attention.

Genneviève Lichtenwalter. Am teacher of piano. Was present at the meeting and heard Mrs. Stokes address. She did not mention the Red Cross. She said we all believed we were in the war for democracy. She wrote the poem under that impression, but later coming to look into the powers that had really actuated the declaration of war, it was probably in the hands of the profiteers. She said a great mass of the people are in the war for democracy and a smaller group of people are in the war for profit.

Annette Moore. Am a lawyer and teacher and former President of a Woman's Dining Club. I will corroborate every word that Mrs. Stokes said on the stand yesterday afternoon. Her subject was "After the War, What", and was purely problematical and apprehensive. Her whole thought seemed to be for the working class, and that if the profiteers—if the profiteers were permitted to charge such extortionate prices as the world

had never known before, when the boys came home from the trenches and found the democracy they had been fighting for had not been won, then we would have a Social Revolution in this country. She did not mention the Red Cross. She also expressed great admiration for President Wilson. Can't remember whether or not it was in the meeting or whether in private conversation, but she said to me, Mr. Wilson was the broadest visioned man in the Government, and she was heartily in accord with him. I don't remember whether she said it at the dinner, or in private conversation, but by social revolution she did not mean bloodshed.

Cross-examined. I heard her say that the profiteers seized upon that slogan, that high sounding grand phrase by our grand President.

Mrs. Stokes (recalled). At dinner at Willow Springs there was the deputy marshal, Mr. Purcell and his wife and Mr. Dillingham. Mr. Dillingham, as soon as we sat down to the table, asked me: "Mrs. Stokes, don't you think the German imperialists are a great menace to the world?" It seemed to me a question of that sort asked any American citizen who had been working for the people, in the interests of the people, was an insult if it was not a joke. I said to him, "Well, so are our imperialists." He said, "Mrs. Stokes, don't you think that we ought to win the war? I said, 'I believe the people ought to win the war, not those who are opposed to the people. I do not want the imperialists to win in this war on any side.'" He said,

"What would you do if the Germans came to New York?"

"Would you fight?" That seemed an absurd question to ask. I would fight, of course, I would fight just as hard as anybody. I said to him, "There are plenty of Germans to fight here too." Later, on the platform, before we were leaving, he said to me, "Good bye, Mrs. Stokes. I will see you in court?" I said, "Don't forget to remember just what I said," and he said, "Oh, no, we are trained to remember." I said, "You are trained to remember everything?" He said, "No, just certain things. We are trained to remember certain things and we pick them out if they are useful to the government." I said, "I hope you

won't forget the conversation that we had."

That is what transpired as I remember it fairly clearly in my mind. I said I wanted democracy, the people of the world to win, world democracy to be a fact in this war and I did not care what else came out of the war provided that result was obtained. In justice to Mr. Purcell I feel very sure in my mind that he is honestly trying to remember this conversation as it happened. I think he is a very square person. At the meeting in Neosho I did not say I wanted the Austrians or Germans to win, because I want decidedly the imperial governments of both Austria and Germany to be defeated.

Mr. Stedman. I want to refer to the "Constitutional Government of the United States by Woodrow Wilson," page 185. I am doing that because they are making a negative deduction from the article published which refers to the beginning of the government. I observe in the indictment that they take a reverse position.

The portion of the book offered in evidence is as follows:

"The chief object of the Union and of the revision of the Articles of Confederation which gave us our present Federal Constitution was undoubtedly commercial regulation. It was not political but economic warfare between the States which threatened the existence of the new Union and made every prospect of national growth and independence doubtful,—the warfare of selfish commercial regulation. It was intended, accordingly, that the chief, one might almost say the only, domestic power of Congress in respect of the daily life of the people should be the power to regulate commerce."

IN REBUTTAL.

Winnifred Houghney (re-called).

Mr. Silvers. At the time you wrote the letter in the Baltimore Hotel did you overhear a conversation between a lady and Mrs. Stokes: "Why, Rose, I was surprised when I read that you were for the government, I mean

for the war." And that lady stated that while she was at Houston she was talking to a soldier, whose name she did not state, and this soldier cautioned her to be careful and not talk too loud and to be careful what she said, as some one might be listening, and Mrs. Stokes said

in substance, "That is just it, they are afraid. They are practically forced into it?" Yes, sir, that was the conversation. At the time this letter was dictated and written for Mrs. Stokes, did she appear excited? No. Did she read the letter over at that time? Yes.

Cross-examined. She read it over and signed it; she appeared to be reading it. She did not read it out loud. How many letters I did write that day is impossible for me to state.

Frederick Williamson. Am a newspaper reporter; at Springfield in latter part of March, was present at a conversation with Mrs. Stokes in the office of the Chief of Police. She made this statement: "That if the people of this country could only

see what this war is driving them into there would be less sympathy with the terrible conflict."

Cross-examined. She did not say while I was there that if necessary I would die for my country or gladly die for my country.

Bernard F. Rathbone. At Springfield, Missouri, am Chief of Police. In my office at the time of her visit to Springfield, in the presence of Mr. Williamson she made this statement: "If the people of this country could only see what this war is driving them in to, there would be less sympathy with the terrible conflict."

Cross-examined. Don't remember her say she would die for her country or give her life for it.

Mr. Stedman asked the Court to direct a verdict of not guilty.

The Court denied the motion.

THE SPEECHES TO THE JURY.

Mr. Silvers. We charge Mrs. Stokes with coming to Kansas City with the direct intention of stirring up dissension and disloyalty among its citizens. Fresh from the East she came where she had drawn crowds to hear her unpatriotic utterances. She denies that the American nation entered the war for idealistic reasons and declares that the war is one to acquire new markets, and that the slogan, "make the world safe for democracy" was put out by the profiteers to encourage our young men to fight to preserve and increase the fortunes of our millionaires. But when she made these arguments at the dinner of the Woman's Dining Club here she stirred up a hornet's nest. Then, when she saw her seditious utterances there had been some how softened in the newspaper reports, she indignantly writes this letter to make her

treason clear. She maintains that she is for the people. It is a singular thing that whenever you find a disloyal German propagandist at his best he is always for the people. God save us from such saviors of the people.

Mr. Stedman. Gentlemen: I shall try to confine my remarks to the facts brought out in this trial and bearing on this case without depicting imaginary conditions or appealing to your emotions by exaggerating or distorting the issue. I know it is the practice of many prosecutors to try to impress the jury that calamity will follow and the safety of the community be jeopardized if the defendant is not convicted, but I shall ask you to consider the law and the facts. In this case is involved not only the conduct of an individual but a principle which is vital in the life of the nation. That is the limitation of criticism or the expression of opinion. The right to approve carries with it the right to disapprove; the right to commend assumes the right to condemn. Without both these rights there can be no democracy. This defendant is accused in an indictment in which there are three counts, all of which grow out of the same act. In other words, the Government pleases to state the same act, hoping that under one charge at least it may obtain a conviction. If a conviction is justified it must be proved that the act was committed with an evil motive, with intent to obstruct and interfere with the military service and with malice. It is incumbent on the prosecution to satisfy you beyond a reasonable doubt on the first count that the defendant intended to create mutiny, insubordination and disloyalty. It must prove that these things were intended willfully and feloniously.

The second count charges that she did willfully and feloniously obstruct the recruiting and enlistment service of the United States. The third count charges that she made a public statement which was knowingly false and was made willfully in the knowledge with intent to interfere with the operation and success of the military and naval forces of the United States, and with the intent to promote the success of the enemies of the United States. The recital of facts is the same, and after the allegations of the letter and publication

it charges that the Government referred to and intended by her was the Government of the United States.

Now, just a word about that letter. She stated in it that she was not for the government and against the war, but that she was for the war and against the government. She has never been against the war. Her statement that the government should not have the unqualified support of the people in its war aims, has been made much of by the prosecution. What are the war aims? President Wilson has enumerated fourteen and later reduced the number to four. We are in a war supposedly for democracy to liberate peoples. We are not in the war to liberate India, and the fabulously wealthy Indian rajahs are united in support of the war. We are not in the war to liberate Ireland. Brave Irishmen were invited to surrender on an Easter Sunday not so long ago and when they had done so were shot to pieces.

For the purpose of showing "state of mind," "intent," or "motive," in relation to the writing and sending of the letter, the prosecutor has put in evidence the address before the Woman's Dining Club, a speech at Neosho, Mo., statements to government officials at the time she was put under arrest, and statements to a newspaper reporter when she was arraigned. Eleven witnesses for the government testified to what she said at the Dining Club. She spoke an hour and a half, or longer, partly in answer to questions at the close of the formal address. Mrs. Stokes had left the Socialist party in the summer of 1917 and rejoined later in the year, and it was during this interval that the engagement to speak in Kansas City was made. When she wrote to the officers of the Dining Club that she would speak as a Socialist, there was some contention as to having her on the program. This was settled at a board meeting, and two of the government's witnesses were among the minority opposing the invitation. All the testimony for the prosecution as to speeches and conversation amounts to no more than this: that she challenged the assumption that we were in the war for an abstraction of democracy; that she said the profiteers were in the saddle; that if this sort of thing went far enough, with the soldiers inspired (though de-

ceived) by the ideal of democracy, there would be an industrial revolution in our country. She expressed herself, also, in sympathy with the Russians in their revolution, and gave a favorable interpretation to the Bolsheviki program. Two witnesses for the prosecution told you that Mrs. Stokes called the Red Cross a camouflage. Every single other witness for the prosecution testified either that she heard no such statement or that Mrs. Stokes positively made no such statement, and every witness for the defense has said no such expression was used. Not only that, but the evidence shows that Mrs. Stokes was knitting, even in November, for the soldiers. The last four presidents of the Woman's Dining Club all testified for Mrs. Stokes that they didn't regard her speeches as seditious. If they who heard her speech didn't find anything disloyal, how can you jurors find anything? With one exception not one woman testified there was anything improper in the speech. Mrs. Stokes was not at the dinner to stop or hamper or impede enlistment of the war. If that had been her purpose, why did she speak at a meeting where women of mature minds attended, at a gathering where there were no young impressionable girls or young men?

When a person speaks of the government, what does he generally mean? In a leading law authority (20 Cyc., p. 1285) that word is defined thus: "In a general sense, the word may be taken to express the ruling power of a country, including legislative and executive; or, in a more limited sense, only the chief executive officers to whose administration the executive duties of the government are especially delegated." That is what we mean when we refer to the government; we do not mean the people of the United States: we do not mean that we are against the President of the United States or the power of Congress to pass laws, or are opposed to a Judiciary or an army and navy and will refuse obedience to them—we simply mean the policy of the individuals who happen at the time to be carrying on the work, who, are temporarily in office—the administration. In that sense I am here against the government and doing all I can to defeat it in this court room. You have heard me call

the prosecuting officers more than once, the counsel for the government, and I am, in fulfilling my professional duty to my client, not for the government but against it, just as the district attorney and his assistants are for it. And that is precisely what was Mrs. Stokes' meaning in her letter.

The counsel for the prosecution has asserted that Mrs. Stokes did not testify that she used the term government and administration as synonymous. He didn't tell you why she did not so testify. It was because the only way by which she could be permitted to testify on that, was in answer to a question on cross-examination by the government, and the prosecutor gave her no opportunity to do so. They have made much of the facts that Mrs. Stokes published an article telling that she would not salute the flag or rise to the national anthem. Remember that once my friend Clarence S. Darrow created a sensation by not rising on such an occasion, but no one questions his patriotism or his pro-war feelings now.

Mrs. Stokes maintained only this, that the war aims of the government were in the control of the profiteers. She cannot unqualifiedly sanction support of the government in the war. Her statement is clear. She says:

"I do not oppose the war, or its prosecution, in any sense. I cannot see, at present, any way in which it can end except by the defeat of Germany." She made clear the difference between opposition to the war aims as the avowed goal of national success, and the war aims inherent in governmental policies and their results. Indeed, her precise complaint was that the fulfillment was running counter to the promises, and her opposition was definitely political, that is, in criticism of the administration, not in any way opposition to military duty or service on the part of any persons. If corroboration were needed along this line, what could be more decisive than the fact that at the time Mrs. Stokes had in the military service her husband and two brothers. She told you that she had prevailed upon her mother to give her consent to the enlistment of the two boys. No matter how this evidence of sympathy in these enlistments is discounted, as coming from her,

the concrete fact of a personal stake in the military welfare remains.

Gentlemen, when you read the income tax report and see that 933 new millionaires were created in 1917, you will realize that large profits were being made out of the war, and you know this money is not being made from the raising of wheat or corn. If we are to give our lives for democracy, can you think of anything more patriotic than to say that the men left at home shall not draw a single dollar of profit from the war? We don't want any building up of armaments—a second German military state. Let us adopt as a slogan "our lives for democracy but not one dollar of war profit for any one."

Her crime is a crime because she struck the profiteers. When you strike the rich of this country you may expect a thunder-clap to come back.

And, gentlemen, let me ask you to seriously consider the question: What influence could these insignificant little sentences in her letter have to pervert the patriotism of any reader of the newspaper or to prevent his support of the war?

Mrs. Stokes is not for the government; she is in the opposition. Is this so startling a discovery as to disrupt the mental poise of a reader. Mrs. Stokes, having some prominence as a member of an opposition party, the Socialist party, corrects the imputation that she has gone over to the other side. As a matter of fact, as the evidence shows, she had done exactly this. She had left her party and gone over to the government, in other words, to the Wilsonian Administration. Then she retracted this step when she found, as she believed, that the expressions of Wilson and motives of Wilson, which she always approved, were not being carried out by those in effective control. So now she was back in the opposition, along with millions of others—she was not for the government, in the same sense in which every person who voted for candidates of the opposition last November against the government. How would this announcement, or this sentence in any interpretation, upset the faithfulness of anybody to the business of winning the war? Or, more exactly, how

would the announcement that Rose Pastor Stokes is not for the government cause insubordination in the military forces and obstruct the recruiting service?

And who was, in fact, responsible for carrying her disloyal words to the 400,000 people that bought the *Star* newspaper. No matter how persuasively she presented the case for publication of her letter, making this writing a part of the newspaper was the act of a will other than her own, in no way related to her by agency or conspiracy. Mrs. Stokes had no control over the Kansas City *Star* as an instrumentality of her purposes. If she had the purpose of criminality implied in a finding of guilt, and if we consider these purposes as going along with the use of the columns of the Kansas City *Star*, by appeal to "the chivalry and courtesy of the editor," it would certainly appear that Mrs. Stokes availed herself of her opportunities with an abstemiousness in strange contrast with the viciousness of her inspiration. It was the editor himself who questioned the propriety of the publication in the first instance, but nevertheless hastened to give it the circulation proved by the testimony covered by our objection. It was the editor who, knowingly and intentionally, gave publication and wide circulation to what he characterized as at least a "disloyal" communication. Her desire was to express her loyalty to the people, as she conceived their best interest, and she entertained no misgivings of unlawful conduct. She could not "intend" the effects of circulation without some kind of control over the newspaper, except on the theory, perhaps, that some one was her innocent dupe. But the testimony is that the communication did get into the paper by stealth or deception, but only upon deliberate inspection and judgment of the managing editor.

What was done with the copy of the letter after the *Star* sent it to the District Attorney's office. That was in the afternoon. Hour after hour went by—I speak from the evidence—and that letter was in the hands of government officials, and yet they permitted it to be published the next day without a protest. Neither the District Attorney nor any government official made a move to stop it. And that is the letter they

tell you is seditious and disloyal and calculated and intended to spread disloyalty. If it was disloyal, tell us why no effort was made to suppress it.

Gentlemen, is it not plain that it was after all the editor of the newspaper and the government officers who gave this letter a publicity that they had in their hands to absolutely prevent, and who, by permitting it to be sent to 400,000 readers, did all the harm they allege was done themselves, deliberately and knowingly?

Mrs. Stokes believes in the people of America. Her ideal of a great universal brotherhood may be a dream, but she has faith in that ideal and she is giving her life to it. And when we have among us those who have such a fine, unselfish faith in a great consecrated community, we ought to do everything in our power to keep them. We have enough people who are narrow and sordid and who care only for their selfish interests.

Gentlemen, the Constitution of the United States is not changed in time of war. Those who wrote it knew that in times of stress and excitement such as the present it would be most important that we should have the right to express our opinions and criticise the conduct of the officers of the government from the President down. Read American history and you will learn that statesmen and publicists of the calibre of Lincoln, Webster, Clay, Sumner and Theodore Parker urged most vehemently that the government was involved in a dishonorable war of selfish interests against Mexico. The theory of the prosecution of this woman is that it is better for the government's war purposes to have everybody in the country think well of it, and to co-operate in the line of the policies "to which it was committed." Assuredly. There never was a sedition law, nor an inquisition of any sort, except on this basis. Men in power have thought in all times that it would be better, they being gifted with the vision of truth, that unruly tongues should be stopped so that the mind of the masses should be free from confusion and unquestioning as to the truth officially declared. The old learning always seeks to crush the new; the old privilege is intol-

erant of the new voice of freedom. The only value of free speech is that of giving to the individual or to the minority a chance to combat the truth or power in general acceptance.

But that is a value so high that the heroism of all ages has been dedicated to its assertion and re-assertion. Our Constitution was written under the profound inspiration of the theory of natural rights. It was written with great jealousy of the encroachments of the power of government on the liberties of the individual, and the scruple was to give the individual the largest possible freedom from governmental interference. The genius of Americanism, as a tradition of liberty, has been precisely this jealous regard for the liberties of the individual.

Social conditions make changes in political thought. War makes changes. All that is needed to negative the constitutional guarantees of individual liberties is an agreement between the legislature and the courts as to the interpretation of language. War is a time when the majority becomes aggressively intolerant. Then it is for courts and juries to be the haven of treasured liberties, even for an offensive minority, because the lesson of history is that this tolerance is the price of peaceful progress. As said by the great Thomas Jefferson:

“To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy which at once destroys all liberty because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. It is time enough for the rightful purpose of civil government for its officials to interfere when principles break out into overt acts against peace and good order.”

Mr. Wilson. Gentlemen of the jury, do you want to encourage it? Counsel has invoked you to encourage what he says may be a dream upon the part of this woman, and if a dream it is a dream distorted and twisted by a hideous nightmare, involving the safety of this country. Do you want to encourage it? Do you want to encourage her doctrines? And

do you want to endorse her ideals that the Bolsheviki government is pure democracy? If you do, as her socialist lawyer insists you to do, and acquit her, I want to say to you, under the evidence in this case, that you will regret it to the last moment of your lives, and as an unworthy heritage, the shame of it will descend to your children.

Mr. Stedman. I take exception to that statement.

The Court. The Court has refrained from any interruptions of traveling outside of the record or anything of that kind. Counsel will address the jury and the Court will charge as to the law.

Mr. Wilson. It is proper for me to make a declaration of that character, in view of the issue shortly defined in this case, that is, whether you believe the messages to the Congress of the United States by our President, declaring in lofty words the ideals of this government, or whether you believe the ideals of this government are as described by that woman. Take your choice between the ideals as expressed by the patient man in the White House or the ideals of that character of government she believes in. Judge ye this day whom ye will follow, and be careful in the matter of your judgment.

There was never an accused put to trial before a jury in a felony case in the courts who did not have a defense. If it be a felony committed under the state law, such as murder, the defense would be self-defense or insanity or an alibi. Now, wanting these defenses, there is nothing left for him to do except to enter a plea of guilty. Every man or woman who faces a jury must have a defense. This woman could not avail herself of the defense that she did not write the letter published in the *Star*, upon which this indictment was based; she could not strike out the words "I am not for the government in its war aims." And so necessarily, what must be the defense of the skilled lawyer from Chicago and a man of standing throughout the country in the Socialist party. He injects and seeks to impress upon this jury an evasion as a defense. The only thing left for her to do is to evade the natural consequences of her own act in writing and mailing

this letter, and causing it to be published in the *Star*. The first instance of such character of defense being interposed was in the very twilight of creation when there were but three human beings on the face of this earth; when Cain could not plead self-defense or insanity, and was asked by the Lord, "Where is thy brother?" he could not plead an alibi, he could not plead self-defense or insanity, and so he said, "Lord Am I my brother's keeper?" If there had been a Socialist lawyer there, possibly defending a Socialist——

Mr. Stedman. I wish to object to these comments; there is no evidence at all——

The COURT. No, there is no evidence as to whether Mr. Stedman was a socialist or not.

Mr. Wilson. He said he was a socialist and refused to stand up in a convention somewhere.

Mr. Stedman. I never made any such statement.

Mr. Wilson. Do you deny you refused to stand up?

Mr. Stedman. No.

Mr. Wilson. Then I leave it to the jury, to decide whether or not he said that "three of us socialists refused to stand up."

I say, that if this instance had occurred as I have stated, the probable defense would have been an evasion of some sort to the character of "Lord, you mistake." It was used in that sense, or used in some other sense, as in this case, that she did not mean the government in its entity; but that she meant some administrative officers of the government, or, in other words, somebody else than those who constituted the government of this country as generally understood.

Now, the question turns in this case upon the intent with which she wrote that letter upon which the indictment in this case is based. All of this evidence admitted by the court was for the purpose of showing the intent with which it was written, not the purpose with which it was written as counsel has stated.

Now, let me state briefly some of the facts in the case. She was engaged to lecture before this dinner of the Women's Club in this city. In pursuance of that invitation she came

here and I want to answer counsel in saying that there were not twenty women in that club—not five women of that club who believed that when she accepted an invitation to speak upon “What, after the war” she intended to insult their patriotism and honor, and that she did do so is proven by the evidence. The testimony of Miss Sullivan is straight and clear to the mark, as an arrow leaves the bow, that she was sitting there near Miss Reineke, and this woman, when a piece of paper passed, said, “You may not want to pay me the money after you have heard me.” Ah, she did not tell her then fairly and squarely what she should have done, that I intend to inject poison into this multitude so that it may spread as a pestilence, to do those very things which the indictment charges. “You might not want to pay me.” Why did she say that, my brother? “If you knew it you might not want to pay me.” Why did she keep it locked in her heart, then, if the heart was not bad, if it was not vicious and if she had not conceived and born anew the hatred for America, the repudiation of America which she once bore. She did not want to tell them, the poison to be injected so skillfully, and that she might stand at arms length, as she is today, in my opinion, the most vicious German propagandist in the United States of America now at large.

What is the further evidence which goes to show that she deliberately knew and willfully did these things charged in this indictment? I can prove to you beyond the shadow of a doubt, that she, in a cool state of the blood, wrote what she did write to the *Star*, the letter complained of now. She sought to evade that, I do not want to use the term falsify, or deliberately misstate the truth, that being a question for you to determine, in determining the weight and credibility to be given the witnesses upon the witness stand, but this is the evidence on that point undisputed and indisputable. Mark you, the *Star* came out with the interview on the afternoon of the 18th. It is not denied, that this letter was written the next morning, or the morning of the 19th. Therefore, between the time that she read the distorted interview in the *Star*, not clearly stating her position, she had time to think

over, she had the rest of the afternoon. She had time to lie awake until the sun rose in the east the next morning, and study over what she was going to write, and then about ten or eleven the next day she wrote this letter, born of the cold blood which was running in her veins, after mature deliberation. I say, my learned friend, that upon that evidence alone, if she was upon trial for murder, that deliberation would be present, constituting it murder in the first degree. Opportunity, to think it over, not done hastily, as she would have you to believe it was done, but after mature judgment. What does the testimony show? She says, "I wrote it hurriedly. I didn't read it over." Do you believe that she did not read it over? That she had it so well memorized by the long hours she had deliberated upon it, that it was unnecessary to read it over. She says, signed it hastily. She was in a hurry, so she says, to get away. Now, the evidence comes as clear as the note of a silver bugle, from the lips of this disinterested young woman, the stenographer at the Baltimore Hotel, who burst, as it were, a perfect bomb in the camp of the enemy when she testified she remembered distinctly the occurrence; it attracted her attention. You know when a person attempts disloyalty, as you conceive it in this country now, it will immediately arrest your attention as a patriotic American citizen, and you fasten your mind upon that to the exclusion of everything else one may say,—and she says that she was cool, that she was not excited and that she read it over and signed it.

As evidence of the fact that she was cool and not excited this letter upon its face bears out the statement which I have made. There are underscored in this letter certain words in order that it might be brought more prominently before the readers of that paper, more prominently to their attention. The word "not" and the word "for." "I am *not* for this government. No government which is *for* the profiteers can also be for the people." Do you believe that it was deliberately written with the intent as charged in this indictment? Do you believe that it was merely the offspring of a transient hurry? No, it was as deliberately done as ever was murder

committed when the murderer was discovered standing over his victim with a bloody axe in his hand. Concocted and deliberately put into execution.

As to her speech before that Dining Club not two witnesses, but three witnesses, one of them the advertising manager, Miss Florence Gebhart, of the Robert Keith Furniture Company, disinterested but at all times loyal under all circumstances, testified that she did say that the Red Cross and Food and Fuel Conservation was merely camouflages, because she heard it; and then there is another witness, Miss De Witt, the school teacher whose attention was fastened upon the speaker because she was asking her a question. She said she did say that the war work and the Food and Fuel conservation were mere war camouflages. And then there was another witness, a Miss Hamilton, who stated the same thing.

Now, mark you, these witnesses were testifying affirmatively. That is to say, what they heard and understood. Ninetenths of the witnesses introduced by the defendant testified to a class of testimony known as negative testimony. That is, "if she said it, I didn't hear it." Some five did say positively that she did not say it. But the majority of the testimony of these ladies was bottomed upon the fact that they did not hear it; so much so that my friend on the other side corrected one of the witnesses and said, "Don't say that you didn't hear it, but state one way or the other whether she said it or not,"—or words in substance. And so you have the positive testimony and so you have the negative testimony. Let me illustrate. Some of you gentlemen, have been at home in the evening about bed time; your wife has said, "Nine o'clock, John, let's retire." And you have said, "No, it isn't nine o'clock." "Why," she said, "yes, it is." "How do you know it is nine o'clock, you say." "The clock has just struck nine o'clock," the wife says. The husband says, "Why it has not." And the wife says, "It has, it just struck nine o'clock." Your hearing is as good as the hearing of your wife would be, but her attention was specifically attracted and she heard the clock strike nine. Your mind was busy with something else; perhaps reading a paper, and your attention

was fixed upon that to the exclusion of other things, therefore, yours was a negative of the proposition and hers was affirmative of it; and so I say that the testimony of those witnesses alone absolutely fix in my opinion, the fact that she did say that the war—the Red Cross work and Food and Fuel conservations were mere camouflages.

There is another view of it that must be admitted, that she did say, because not specifically denied but only in a way denied, and that by way of explanation, and that is, this is a war for profiteers; it is a war substantially to protect the millions of Rockefeller. The defendant testifies to the contrary of that and in effect says that you would not go to war for Morgan's millions; simply another evasion because witness after witness has taken the stand and stated in substance that she did say it was a war for profiteers and that this war was being conducted not under the slogan as we understand it, and which she says was given to mislead and to deceive, but that it was a war to protect the millions of Morgan.

Now, gentlemen, there is another proposition which Mr. Silvers did not touch upon to any great extent, and I want to direct your particular attention to that. In her explanation to this jury, in an attempt to explain away that which is as certain and fixed as a granite wall, and which can admit of no explanation because written and signed by her, there comes in the economic theory, a sort of social economic condition that ought to be remedied. "My ideal." Why, "my ideals," these days are cropping up as fast over night as the measles break out over night. Every body has some sort of ideals or they have some sort of an economic theory. Did you ever hear of a defendant charged with so grave an offense as this woman is charged with, pleading an economic social revolution? I say if that was her intent when she had that letter written and caused to be printed, that there should rise up in this country an economic revolution, then she is as guilty as if she had prayed direct for an armed revolution to rise up in this country. In other words, it is the subtle injection of the propagandist, not made directly or openly, but subtly, as no man or woman in this country could directly advocate the

cause of the Kaiser and escape, but in order to do it so effectively, it must be done carefully and skillfully and subtly, as subtly as it is possible to do so. For instance, you meet a man on the street and he says to you, "Did you hear Pershing's army has mutinied?" "No," "Where did you hear it from?" "I saw it in some paper." "What paper did you see it in?" "I don't know." You tell your neighbor and he tells another and so on until there has come into full flower and blossom that which is false but the most powerful and the most subtle poison which the Kaiser employs. I do not charge that the defendant in this case is a paid agent of the Kaiser's, but I do say this, that she is a frenzied fanatic upon socialism. According to her own testimony, since the day that she was able to think for herself she has been a socialist. She wants to relieve conditions in this country, according to her belief, they should be relieved. She wants to inject an ideal and inject it in the time of war, seizing upon this time in which to create an economic revolution, a poison which the Kaiser employs. I do not charge the defendant is a paid agent of the Kaiser's but I do say this, that she is a frenzied fanatic upon socialism. She believes in that thing that is termed the Bolshevik form of government, or rather of principles.

Let us see if that is not her exact condition or situation and if so, if you want to follow her and in the midst of this war have a Bolshevik form of government in this country.

Now, there is no denial of this. This is admitted. This is from the lips of Mrs. Stokes herself: "One question asked me was this: 'Do I approve of the social revolution in Russia,' I said 'I approve of the ideals for which Russia was striving, and I approve [thoroughly] of the ideals of the Bolshevik, the ideals they are striving for; that I know them to be honest, sincere socialists, who are working in the interests of the people.'" And again, "Another question was put to me." Those questions, as you will recall were put to her by a school teacher, Miss De Witt, who was upon the stand. "Another was put to me: 'Why I did not go back to Russia if I felt that conditions were not quite right here' and it was put indirectly." That was the best question I ever heard put to

a public speaker who was advocating a dangerous form of government in this country. Miss De Witt is a teacher in the public schools of this city and I wish that every teacher who instills knowledge into the minds of the children of this country were built along the same educational lines and had the same ideals that Miss De Witt has. And so she rose in her place and asked her if she believed those things in effect. In other words, "Why don't you go back to Russia where you belong? We are getting along pretty well in this country. We have a government whose flag stands for everything, Madam, that you stand for, and that has protected the poor, the weak and the defenseless, ever since the Constitution of the United States became the bulwark of the freedom of the world. Why don't those who have gained power and developed wealth and made friends here, who are not born in this country, why, if they do not like certain institutions and are criticising certain institutions, why is it they do not return to their own countries?" And I rose to reply and I said "I presume, Madam, that you are referring to me when you say that." "Eager to go to Russia." She was very eager to go to Russia "when the revolution took place, because I wanted to be helpful." Helpful to whom? Helpful to the triple alliance of the Kaiser, the devil in hell and the Bolsheviks in Russia. That is the triple alliance that is waging this cruel war. Why, the same character of seditious disloyal utterances that woman spoke and caused to be printed and distributed were the very sort of German propaganda that was so successfully introduced in Russia and caused the dethronement of Kerensky and caused the Bolshevik party to be supreme, and caused men who have been active and energetic and who have fought their way in the world, and have accumulated some substance, that their lands should be divided, and their strong boxes and banks broken into and their wealth distributed.

Mr. Stedman. I object to these comments on the evidence, as not a fair inference from the evidence.

The COURT. The jury has heard the evidence and the Court has

allowed counsel to argue outside of the evidence their theories of the case.

Mr. Wilson. "I said I was indeed very eager to go to Russia when that revolution took place because I wanted to be helpful, and I asked to go over and that was not permitted, and I instanced Emma Goldman"—who is now a safe Emma Goldman until this war is over—"The case of Emma Goldman and Mr. Berkman, when they were first arrested and charged with certain violations of the law. That was before the first revolution in Russia, they were threatened with deportation to Russia. That was before the revolution at all. That was before the czar was deposed."

Now, in other places in her speech before the jury, and that is a proper characterization of her testimony before this jury, admitted properly by this court as only bearing on the third count of this indictment—the long statistics which she read, compiled from various sources, she did not say directly prepared by Mr. Stedman, but furnished her by others from which she testified, and bearing only upon the third count of this indictment. There can be no denial of this, that she does believe that the Bolsheviki principles are the principles of true democracy, and that if she could have gone to Russia, she would have aided them. God knows we do not want her aid. We want strong, loyal women, like those we saw marching in the streets here the other day. Women who are loyal unto death for their country, the working women, Madam, of this city, for whom you would create an ideal, when they live ideals now, under the American flag which flutters to every breeze that bears to them the gladsome tidings that they are the social equals of queens; the working women, the women of the merchants in whose stores they work, the wives of judges, the wives of those who labor in the judge's offices, the wives of lawyers and of their clients; all forming the most beautiful, entrancing picture that the eyes of any human being in Kansas City ever rested upon as they wound through these streets, a perfect blaze of color. As they rounded the corner, near this office, their came from their lips the song of the Marseillaise, and then, blending in delightful unison was

the Star Spangled Banner, all making a picture and melody which will live in the hearts of patriotic people as long as they are able to recollect the inspiring events. Those were the kind of women, and not the capitalists, but the true working people of this city who had gone out to fight for the Red Cross, which she figuratively spat upon.

Before America went into this war she was for the Red Cross, and since then she has not done Red Cross work. To illustrate more vividly the venom that is in the heart of this foreign-born woman——

Mr. Stedman. I want to object to the comment, both as to the "no work for the Red Cross" and to "foreign-born woman."

The COURT. I think it is improper to take into consideration the question of where the defendant was born.

Mr. Wilson. The defendant, the evidence shows, and she stated on the stand, she was born in Russia.

Mr. Stedman. I take exception to the other part with reference to her retirement, as he argues, from Red Cross work.

Mr. Wilson. I understood the witness to say that since America entered the war she hasn't done war work at all.

Mr. Stedman. The evidence is she was working here in Neosho.

The COURT. Counsel has appealed to the Court as to that evidence. The jury will remember what the evidence was. The recollection of the Court is, that she said she had done no Red Cross work. She had done some knitting but she didn't state that knitting was done for the Red Cross.

Mr. Wilson. That is my understanding of it exactly. She did say she had done knitting at Neosho, Willow Springs, or wherever she was, Springfield, but whom did she knit for? She certainly had the opportunity to say.

Mr. Stedman. She answered, "For the soldiers there."

Mr. Wilson. She didn't say, in my judgment, that it was for the soldiers there. She said she did some knitting. If I

am mistaken as to this testimony, you gentlemen will recollect it. If she said for the soldiers I didn't hear it, but I know she did say that her work for the Red Cross had ceased when America went into the war. Why this splitting of hairs over matters of this kind? She is an open and deliberate advocate of the Bolsheviki form of government or principles in this country. That is enough to convict her of the intent charged in the indictment. As I stated a few moments ago I do not say or intimate that she is a paid emissary of the Kaiser. There are some things which reach far above wealth and that is the ideals some people have of a different sort of government from that which we have, and so it was, for the purpose of promoting a revolution in this country, economic, if you must say so, and so make the soldiers dissatisfied with conditions which they left, because she is what I have termed a fanatic on the subject of socialism, and she spoke from the viewpoint of a fanatic, willing, and will take with a smile any punishment which this court may mete out to her, because the most glorious thing a fanatic can do is to be made a martyr of for the few shallow-pated idiots who applaud her for being a martyr. The great mass of the socialist party, I am glad to say, are as loyal to the flag as the great mass of democrats and republicans and prohibitionists and progressives, but there are bad men and bad women in the democratic party and bad women and bad men in the republican party and other parties, and I want to say in answer to the counsel's intimation in this case, that it has been my duty and my pleasure to have—to prosecute and have loyal juries convict every human being who has gone to trial in this District Court for violation of war measures. They have been democrats and republicans but this is the only socialist that I have been called upon to prosecute. There were some draft evaders or those who attempted to interfere with the draft, who may or may not have been socialists, but it is the bad men and the bad people in all these parties that we have to look out for.

"I did not say that I had stopped knitting for the soldiers. Question. No, I thought you said you had not done any Red Cross work since America entered the war." There is no

denial to that. "Answer. I did not say that I stopped knitting for the soldiers." Another evasion skillfully prepared by this intelligent lady. "Question. But you did not say that you had stopped knitting?" "Answer. I had not."

See how delicately she parries it. She is the defendant upon trial. She is the one most interested of any human being in this world upon the outcome of this case. But instead of directly answering "no," she said "I have not stopped knitting for the soldiers."

And we may draw the inference from that that she is knitting for her brother, a soldier. There sits beside her in this case a soldier in the army of the United States, her husband. Was she knitting for him? A man whose mouth has never been opened in this trial in her defense——

Mr. Stedman. I want to object to that because I couldn't call him.

The COURT. The objection is sustained.

Mr. Wilson. I don't understand under what theory he could not have testified. I retract the remark anyway if——

Mr. Stedman. I would like to have the Court direct the jury that it is incompetent for a husband to testify for or against the defendant in a criminal case.

The COURT. The Court so directs the jury. The Court does instruct the jury and the Court refused to permit him to testify.

Mr. Wilson. All right. And that was improper and I should not have uttered it. But I resume where I left off and say that she may have been knitting for her husband who is in the army and himself a member of the Coast Guards of New York. And so I say again, that it was a mere evasion in a subtle way of getting to the hearts and emotions of this jury. Now, what are you going to do with the condition as it appears today in this country? Are we going to listen to the idle talk and reasonings of this distinguished socialist lawyer and his interpretation of what was meant by that article? That article, if it requires a lawyer of his ability and of his stand-

ing, and of his enlightenment, to make it plain to the jury what was meant by the article, could you expect the soldiers of the various cantonments throughout this country to interpret that which requires him almost forty minutes to try to interpret for your satisfaction? No, the language was written, "I am not for the government." And in a way, against the ideals of this government. She wanted to make it so plain there could be no mistake about it. Now, I say the whole case turns upon the intent with which these articles are written. If it be an economic revolution she is attempting to foment in this country now, should she be permitted to proceed with her campaign? That it was a carefully mapped out campaign there can be no doubt about. She had speaking engagements at various points in this state.

There is one deliberate charge made and an insinuation made against my office, an insinuation which ought to have blackened the heart of the men who conceived it and scorched his lips when he uttered it, that I had—

Mr. Stedman. I did not evidently convey my meaning to Mr. Wilson. I tried to make it plain that I did not charge you with it but I did believe and I do believe that when you read it you did not at the time think it was seditious.

Mr. Wilson. Why have you the right to assume that I would dishonor the office that I hold by saying that I knew, or must have known that this was a seditious and disloyal letter and that I withheld it?

Mr. Steadman. I don't think you thought so.

Mr. Wilson. You did it by intimation and by insinuation.

Mr. Stedman. At least I did not—

Mr. Wilson. You wouldn't stop at anything in this lawsuit to free this woman who is trying to preach the Bolsheviki doctrine in this country. I will leave it to this jury what he said. That I had it in my office from half past four o'clock,

or about that time. The evidence is that it went to the secret service and that afterwards, Mr. Stout, misapplying the term, said district attorney's office instead of what he first said, the secret service department. The first I ever knew about it was either the next day or the day after when my attention was called to it.

Do you think, men, that I am going to be a party to a deliberate violation of my oath of office? I want to say to my friend on the other side, much as it would be of personal distaste for me to do it, that if he goes upon the streets of this city or in any hall of this city and preaches that which is seditious and disloyal about this government I will do the best I can to send him to the penitentiary; or any other man, be he socialist, democrat, republican, white or black, and you wouldn't have the respect of a dog in your heart for me if I was afraid to do my duty; I play no favorites. God help me if I would play favorites in this office in times like these, may my tongue turn to a putrid mass in my mouth.

There are efforts made for certain purposes, to discredit Mr. Stout of the *Star* for publishing this article. I hold no brief for the defense of Mr. Stout, but I do say that he acted right when he sent the article to the secret service department. He didn't know, as he said, whether or not it would be legally disloyal or otherwise, and sent it to the secret service department and from that department it passed to the investigating department and from that department to my office in the regular routine of business.

The defendant was upon the witness stand and has told you, with the art of the born actress, that she is, about her early life, her birth in Russia, her coming over here, the factory conditions and how she was half starved and was half clothed and the miserable treatment—a direct play upon the sentiment of men who ought to be as iron men in times like these. But there are women born on the farms that have endured as much as she ever endured, who have cooked for the harvest hands late at night when they come in, and worked for them and their husbands and families long before the sun is up, all through the day, indeed instances where

women's work is never done. There are women who work in factories in this city who are happy and contented; who have raised families; who are taking their part in the great economic machinery of this country without complaint; because they know that every remedy that she could give them from what she terms her ideals are now obtainable under the Constitution of this country. But are these women attempting to foment and disturb this country at a time like this? If you will find me one good woman in the country or in the city, whether they are rich or poor, who is not imbued with patriotism of the right sort, of patriotism in times like these, for every one of them, I will show you a thousand good women who are actuated by entirely different motives.

Now, they started out with the defense in this case with one theory, and abandoned it right in the middle of it. Their theory now is that the government may be divided in the minds of the people in two ways, that is, in substance, the government as an entity, and the government as constituted by governmental officers, and so my friend goes on and says, we have a right to criticize Baker and we have a right to criticize Lansing, and we have a right to criticize Creel and a right to criticize Baker, and we have a right to criticize all these officers. I agree with you for once. You have a right to criticize them, but you cannot do it in seditious language. You must criticize them as heads of respective departments. They are subject to criticism and nobody denies it, but where once did this defendant criticize Baker, Lansing, Creel or other officers, and yet she would have you believe that she did not mean government as an entity and as you understand or as I understand it, and as it is generally understood. She now is very gushy in her praise of the President. Why did she not praise him extravagantly in her public speeches? The defense put up is that this government was run by the profiteers. Who runs the government? Do the profiteers run it? And if so, who are the profiteers? Do they mean, because there has grown out of this war abnormal conditions, that hogs which once sold for \$5.00 before the war are now \$17.00? Does she mean that class of profiteers running

the war? Cattle which sold before the war at 5 and 6 cents are now 18 and 19 cents, by reason of these abnormal conditions? Is that running a government by the profiteers? Or wheat, wheat that we were all once glad to get 85 cents or \$1.00 for is now \$2.20 by reason of war conditions? Is that running the government by the profiteers? She only includes all of that class engaged in what was termed once the trusts, to inflame the minds of the jury upon a dead and buried subject; because neither the republican party nor the democratic party now stands for trusts in any way, or the progressive party nor the great mass of the socialist party, and so when you come down to it, what does she mean? "Run in the interests of the government and its profiteers."

Gentlemen, it would take me half the day to go over this mass of testimony and the notes I have made. I feel it is indeed a reflection upon your own intelligence for me to argue to you what side you are going to take in this case today. Who are you going to believe? Let me read this to you hurriedly. It is the voice of the President in his war message speech to Congress, outlining why we are in this great war:

"Its peace must be planted upon the solid foundations of political liberty. We have no selfish ends to serve. We desire no conquest, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. We are but one of the champions of the rights of mankind. We shall be satisfied when those rights have been made as secure as the faith and freedom of nations can make them.

Just because we fight without rancor and without selfish objects, seeking nothing for ourselves, but what we shall wish to share with all free people, we shall, I feel confident, conduct our operations as belligerents without passion and ourselves observe with proud punctilio the principles of right and of fair play we profess to be fighting for. . . . To such a task we can dedicate our lives and our fortunes, everything that we are and everything that we have with the pride of those who know that the day has come when America is privileged to spend her blood and her might for the principles that gave her birth and happiness, and the peace which she has treasured."

These are in the message upon hearing which Congress voted the declaration of war. Choose ye this day which is right, the declaration of the principles of war that we fight

for, or the Rose Pastor Stokes right in what she conceives, when she says, "I am not for the government that is being run in the interests of profiteers." Do your duty fully by the defendant, give her the benefit of every reasonable doubt, —which means a substantial doubt founded upon the evidence and not upon the mere possibility of her innocence, and do your duty by your government when you retire to our jury room to take up the facts in this case. With the punishment you have nothing to do. All you have to do is to find the defendant either guilty or innocent.

THE COURT'S CHARGE.

JUDGE VAN VALKENBURG. Gentlemen of the Jury: This prosecution is brought under an Act of Congress approved June 15, 1917. Section 3 of that Act provides as follows:

"Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

The indictment is in three counts, each count being predicated upon a prohibition of this statute. The act of the defendant complained of is the causing to be published in the *Kansas City Star*, a daily newspaper of wide and general circulation the letter you have heard read.

This letter was dated March 18, 1918, and, at the request and demand of the defendant, was published in said newspaper March 20, 1918. In the first count of the indictment it is charged that the defendant unlawfully, wilfully, knowingly and feloniously did attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States in preparing, publishing and

causing to be printed, published, distributed, circulated and conveyed in and by means of said newspaper the letter just quoted.

In the second count of the indictment it is charged that the defendant did unlawfully, wilfully, knowingly and feloniously obstruct the recruiting and enlistment service of the United States to the injury of the said service, and to the injury of the United States in thus preparing and publishing the said letter.

In the third count of the indictment it is charged that the defendant in preparing and publishing said letter, as aforesaid, unlawfully, wilfully, knowingly and feloniously did make and convey certain false reports and false statements with intent on her part to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of the enemies of the United States.

It is necessary at this stage of the trial—at the conclusion of the taking of testimony and of the arguments of counsel—that the Court should instruct you upon the principles of law applicable to prosecutions of this nature under the statute in question, in order that, being advised as to the law of the case, you may apply the law to the facts in evidence and therefrom determine what your verdict should be. The duty and responsibility are cast upon the court to declare the law. The jury accepts such declaration and definition as controlling in the case. Of the facts, however, you are the sole judges. You arrive at your conclusions thereon independently of any suggestion from court or counsel. It is, of course, proper that the court, in the submission of the case and in illustration of the principles of law involved which must guide you in your determination of the ultimate effect of such facts upon the question of guilt or innocence, should discuss in some degree the evidence produced before you, and the court may, with propriety, express its opinion upon it, but you are not bound by such expression and may adopt or reject accordingly as it does or does not meet with the approval of your judgment under all circumstances of the case.

It will be necessary that you should consider all three of

the counts in the indictment and make a separate finding upon each. Each count states a distinct and separate offense and calls for a distinct and separate verdict. All three counts, however, involve the same act on the part of the defendant. They involve three different applications and interpretations of the same transaction. The law officers of the government, in formulating this indictment, have stated the situation to meet the several offenses denounced by the statute which has been read to you leaving it ultimately to your judgment to determine whether an offense has been committed under any or all of such charges under the evidence produced before you. Therefore, you may find the defendant guilty upon all the counts, or not guilty upon all the counts, or guilty upon one or more of the counts and not guilty upon the balance, accordingly as you may view the evidence under the law as declared by the court. It is proper, however, that the court should say to you that because each count deals with the same act or transaction, you should not thereby be deterred from rendering a true verdict of conviction or acquittal, as the case may be, upon each of the three counts submitted. The court will take that matter into consideration, in case of conviction, in dealing with the matter of penalty.

To avoid confusion, the court will deal with the counts separately, and, for convenience, will discuss the third count at the outset. This count, as has been said, charges the defendant, in the preparation and publication of the letter in question, with having made and conveyed certain false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States. The alleged false report and false statement is charged to consist in the declaration contained in the letter that the government of the United States is for the profiteers and not for the people. For this reason, the defendant further declares that she is not for the government and does not believe that the government of the United States should have the unqualified support of every citizen in its war aims. The statement made that the government is for profiteers, so-called, that is to say, those who make, as commonly understood, excessive financial profits out of business conducted

during and, perhaps, fostered by war activities, and not for the benefit of the people at large, is thus, in the letter itself, directly coupled with a resulting view on the part of the defendant that the government should not have the unqualified support of every citizen in its war aims. If that is a justifiable view on the part of the defendant, then it would be equally justifiable on the part of the public generally. And this letter appears on its face to be written in order that the public generally might know the defendant's views and the underlying reason for those views. People who take the lecture platform, or seek to promulgate their views through the press, do so generally for the purpose of securing wide circulation, and, if possible, adoption of those views. Otherwise, what is the object of employing these obvious instruments of publicity? In the present case, pecuniary profit or gain is not shown. She says, in some of her utterances produced in evidence before you, and they are admitted solely for the purpose of shedding light upon her intent and purpose, that she seeks "a chance to make clear the class character of the struggle and to clear away for other workers the illusion that this is a war for democracy by governments interested in democracy." Now, gentlemen of the jury, the newspaper in question in which this publication was made reaches a great number of people, being delivered even in the army camps of the United States. Among those outside such camps are men within the age of enlistment, to wit, between the ages of 18 and 45 years, and within the age of conscription, to wit, between the ages of 21 and 30 years, both inclusive. There are those who have already registered and received their serial numbers as a preliminary to entrance upon active service in the army and navy of the United States; there are the mothers, fathers, wives, sisters, brothers, sweethearts and friends of these men; in fact, all the complex life of communities which, in the aggregate, with others of like nature, make up the life and physical forces of the nation. If the statement made in this letter, and the resulting attitude therein voiced, should meet with credence and acceptance by any appreciable number of its readers, could they fail to produce a temper and

spirit that would interfere, and tend naturally and logically to interfere, with the operation and success of the military and naval forces of the United States? And could such an unfortunate result fail to promote correspondingly the success of the enemies of the United States? Our armies in the field and our navies upon the seas can operate and succeed only so far as they are supported and maintained by the folks at home, and the measure of their success depends upon the degree and intensity of that maintenance and support. Any statement, then, made knowingly and wilfully and with intent to promote such interference with the operation and success of our military and naval forces and to promote the corresponding success of our enemies, if false, and known to be false, or not believed to be true by the one who makes it, comes within the terms of this Act of Congress.

It is the contention of the District Attorney that the word "government" as used in this letter refers to the government of the United States of America as established by our Constitution. In other words, that reference is made to the form of our institutions as distinguished from the personality of those charged with administration. In the Constitution, and in our institutions generally, rights of property are defined—rights which the defendant in some of her expressions seems to discredit. The United States is referred to by her, in substance at least, as a capitalistic form of government which oppresses the poor and enriches one class at the expense of another. The objectionable classes are referred to as the upper and middle classes. This would include all who, by industry and prudence, have made accumulation and provision for the future. The classes referred to embrace not only those of large wealth but those of modest fortune as well. According to witnesses for the government in this case, the present Bolshevik government, if it can be called a government, of Russia, is characterized by the defendant as ideal. There the workers, so-called, are permitted arbitrarily to seize and divide up the land and wealth of the country irrespective of former ownership. If such a system were to be applied to this country, not only the so-called rich, but the small land-holder and

the small merchants, would be called upon to divide their holdings on a per capita or similar basis. Such are the views of this defendant as gathered from her expressions introduced in evidence on the part of the government. You will recall to what extent that was modified or denied by the defendant and her witnesses. Of course, the Constitution of the United States, in its provisions for equal opportunity and its guaranties that every citizen shall enjoy life, liberty and the pursuit of happiness and the proceeds of his own industry, was not established for the benefit of war profiteers nor for any other than the people generally. It is for you to judge whether, if that be the meaning intended by this letter, the statement therein contained is true or false, and, if false, whether it was knowingly and wilfully—that is, intentionally—made by the defendant, and for the purpose charged in the indictment.

But the defendant contends that in the use of the term “government” she had reference, not to the form of government, but to those by whom it is at present being administered. The term “government” is used in both senses. In other words, that the operations of government have been diverted from their proper channel and that we have been plunged into war for the sole purpose of serving the greed and cupidity of industrial profiteers and not in the interest of all the people. Of course, there is a strong presumption existing against such a prostitution of our national honor by those to whom the administration of our affairs has been committed by popular voice. But the government, by this indictment, charges, and has assumed the burden of proving, that even from this viewpoint the statement is false. Its counsel have introduced the address of the President before Congress recommending, for the reasons therein set forth, a formal declaration recognizing the existence of a state of war, and have also introduced in evidence the resolution of Congress recognizing such a state of war, also the war aims of the nation as stated by the President to Congress in his address of January 8, 1918. In the resolution of Congress it is recited that the Imperial German Government has committed re-

peated acts of war against the government and the people of the United States and that the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is thereby formally declared. The causes referred to are matters of history and of common knowledge and do not demand explicit repetition and recital here. The President bases our entrance into the war upon the highest grounds of humanity and unselfishness. From the evidence you are to determine what the defendant meant by this statement, and what, if anything, she intended to accomplish by it. The court will refer to her explanations a little later on.

If then, you believe beyond a reasonable doubt, which will hereafter be defined to you, that within the jurisdiction of this court in the preparation and publication of the letter in question the defendant knowingly and wilfully made and conveyed a false report and false statement with intent on her part to interfere with the operation or success of the military or naval forces of the United States, and to promote the success of its enemies, the offense charged in the third count of the indictment has been established, and you should say so by your verdict. Bear in mind that you must find that the act was wilfully and knowingly, that is, intentionally, done, and for the purposes charged. It is necessary, further, that the United States should have been at war at the time the act complained of was committed. This, however, is a matter of which the court takes judicial notice, and you are instructed that the United States was at war when the letter in question was prepared and caused to be published. If you find any one of the foregoing elements of the offense lacking, you should acquit.

In the first count of the indictment it is charged that the defendant unlawfully, wilfully, knowingly and feloniously did attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States in preparing, publishing and causing to be printed, published, distributed, circulated and conveyed in and by means of said newspaper the letter just quoted.

To sustain the charge contained in this count, it must appear to your satisfaction, first, that the United States was at war when said letter was prepared and published. This is a matter of common knowledge, of which the court takes judicial notice, and you are accordingly instructed that the United States was at war at the time the alleged offense was committed. Second, it must appear to your satisfaction that the defendant prepared the letter in question and caused it to be published. This is admitted. Third, the statements in the letter must have been of a nature naturally and reasonably calculated to cause insubordination, disloyalty or refusal of duty in the military or naval forces of the United States. Fourth, the publication must have been made by the defendant wilfully, that is to say, knowingly and intentionally, and as an attempt to cause such insubordination, disloyalty or refusal of duty.

Discussing, then, the nature of the publication and its adaptability to the accomplishment of the purpose charged, it is proper first to define to you what is meant by the military or naval forces of the United States. In the first place, they include all in active service, either in training at military or naval camps or within the body of the army and navy in actual service after the period of training has been completed. In the next place, by Act of Congress, still in force, all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States, under and in pursuance of the laws thereof, between the ages of 18 and 45 years, are declared to constitute the national forces, and, with such exceptions and under such conditions as may be prohibited by law, shall be liable to perform military duty in the service of the United States. Third, by the Selective Service Act of May 18, 1917, the President was authorized to increase temporarily and for the purposes of this war the military establishment of the United States. All male persons between the ages of 21 and 30, inclusive, were required to register on the fifth day of June, 1917. They did so to the number approximately of ten millions. All were given a serial number, and subsequently

thereto and from time to time have been, are being, and will be, drawn and placed in active service, according to their classes and physical ability and as necessity may arise. All such male persons so registered and having received their serial number subjecting them to call are a part of the military and naval forces of the United States. It will thus be seen that such military and naval forces consist of those already at the front, in training camps preparatory thereto, and among the body of the people subject to call and enlistment for military and naval service. The wide and general circulation of the newspaper in which the publication was made among the several classes of our military and naval forces has already been referred to. You are to judge what the possible, if not the probable, effect would be of communicating to these men, belonging to the classes designated in the statute, of informing and advising them, as the letter in terms does, with the natural effect of producing some degree of conviction, that the government at whose behest they were fighting, or about to fight, in the belief that their services was consecrated to the maintenance of that government and its people, was not a government for the people, but for the profiteers—a term of reproach by general acceptance—and further in the same connection, that for this reason the government of the United States is not entitled to the unqualified support of citizens in its war aims. Anything which lowers the morale and spirit of our forces, which serves to depress, to dampen the ardor, to chill enthusiasm, extinguish confidence and retard co-operation, may very well cause insubordination, disloyalty, mutiny or refusal of duty. It is your province to determine what the effect of the publication in question would be in the case before you.

The resources of the nation consist of men, money, food, fuel, manufactured products and the care of men who are in the military and naval service. To get all these things requires loyal, earnest and willing support on the part of people generally. If it was aimed by this letter, in whole or in part, by destroying faith in the war aims of the government, to bring about a condition in this country similar to that in

Russia under the revolution, would that not, in your opinion, involve insubordination, disloyalty and a refusal of duty in our military and naval forces as we know were present among those in Russia?

That that publication was made wilfully, that is to say, purposely and intentionally, is not disputed. The fourth, or remaining question, is what was the intent of the defendant in thus exploiting the views contained therein? You have heard her statements and explanations. You consider them in connection with all the evidence in the case and as part thereof. You are, of course, not concluded thereby but have resort to all the surrounding facts and circumstances in evidence. Other statements by the defendant, both oral and written, within a period proximate to the offense charged, have been placed before you for the purpose, and for the sole purpose, of shedding light, if any they may, upon her intent and purpose, because, as I have said, the wrongful intent must be present. It is a part of the charge that the defendant made an attempt to cause insubordination, disloyalty, mutiny and refusal of duty. The defendant is not on trial for any words or expressions other than such as are contained in the indictment, but you may have recourse to her other utterances, admitted in evidence, in arriving at your conclusion of her intent and purpose in writing this letter of which complaint is made.

A number of witnesses have testified that in her address before the Women's Dining Club, two days before this letter was written and four days before it was published, she stated, among other things, that it became necessary to adopt the slogan that the United States soldiers were fighting for their Democracy in France; otherwise they would not go to fight as they were, in reality, fighting for the capitalists, and many of them would die fighting for Morgan's millions, or words to that effect; that there would be a revolution in the United States after the war, and if the war was prolonged, it would occur earlier; that the Bolshevik movement in Russia was ideal; that the land there was now being divided and people could go on this land as long as they desired without expense, and that the banks and vaults were being broken into and

the money was being divided among the people, to whom it rightfully belonged; that the United States would have a revolution in the future and that the Bolshevist movement was the ideal movement; that after the war, if not before, all these things would be known and a great revolution in the United States would result. To others she is said to have stated that Russia's present government is an ideal one; that if the people of this country could only see what the war is driving them into there would be less sympathy with the conflict. In her letter seeking a speaking appointment in Kansas City she desires to take as her subject, "Why I Came Back to the Socialist Party." She says: "It gives me a chance to make clear the class character of the struggle, and to clear away for other workers the illusions that this is a war for Democracy by governments interested in Democracy." If you believe she said these things, there can be no doubt that it was her eager desire and purpose to give these alleged unworthy aims of the United States in this war the widest publicity and circulation within her power and thereby to obtain converts to this view. That, however, as the court has said before, is a matter addressed to your judgment, and yours alone. If you believe she made the statements to which witnesses have testified, and to which I have made reference, the exact language, of course, being left to your own recollection of the testimony, it would appear that she expected that when the true state of affairs—as she claimed and stated them to be—came to the knowledge of the fighting forces, that is to say, to the military and naval forces of the nation, a revolution would result. In this connection reference was made to the revolution of the Bolsheviki in Russia and the ideal government resulting therefrom. Well we know that this revolution, of which it is testified the defendant approved so highly, put an end to the activity of Russia against Germany in this war, disintegrated Russia into helpless subdivisions and made her, in effect, a German province. Responding to the appeals of those who fomented that revolution, the soldiers at the front and in various parts of the empire threw down their arms, ceased to resist and submitted meekly to the invader.

Whatever the motive that inspired that movement, it stands out as the greatest betrayal of the cause of Democracy and humanity that the world has ever seen. You will recall and consider also the defendant's denial and explanation, in whole or in part, of the foregoing testimony by witnesses for the government, and all testimony introduced on her behalf.

From all the evidence in the case you are to determine whether the defendant, by the act charged, wilfully and intentionally attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States.

"Insubordination" means failure on the part of persons in the military or naval forces of the United States to abide by and conform themselves to the rules, the laws and the regulations of the military and naval forces of the United States. "Disloyalty" means unlawful conduct—that is, violation of the laws, the rules and the regulations relating to the military or naval forces of the United States or the carrying on of the war. "Mutiny" means revolt or rebellion, or refusal to discharge duty and obey the orders of the constituted authorities, particularly of the military or naval service. "Refusal of duty" is another expression found in this law, and that means refusal to comply with the rules and the laws and the regulations relating to the United States military and naval forces, or relating to the organization of the army or navy, or relating to the carrying on of the war.

Coming now to the second count: In the second count of the indictment it is charged that the defendant unlawfully, wilfully, knowingly and feloniously did obstruct the recruiting and enlistment service of the United States to the injury of the said service, and to the injury of the United States, in thus preparing and publishing the said letter. Much that the court has already said with respect to the first count applies here. In order to constitute the offense, the United States must have been at war when the letter in question was prepared and published, and this is conceded. The defendant must have acted wilfully and knowingly and must have intended the consequences of her act as charged. It will be

unnecessary to repeat the circumstances to which reference has been made as bearing upon the question of a wrongful intent and purpose. You will take into consideration all the evidence in the case introduced on behalf of the government, as well as on behalf of the defendant, in determining what the object and purpose of the defendant was in causing the publication aforesaid. Your attention has been directed to the provisions of law which make all able-bodied male persons between the ages of 18 and 45 years, inclusive, eligible for enlistment. The army may be increased by recruiting from such. Recruiting stations are established in this city, as in many parts of the country, and by posters placed in windows and upon bill boards, and by various other means, eligible men are solicited to join the army and navy. All such instrumentalities, with the officers in charge thereof, constitute, in part at least, the recruiting and enlistment service of the United States, and anything that tends to obstruct and interfere therewith is manifestly an injury to said service and to the United States itself, which requires soldiers promptly for its defense and for the effective prosecution of the war. It is, of course, apparent that such obstruction or interference need not necessarily be physical. But if the publication made, coming to the attention and notice of those who might otherwise join the service, is of such a nature that it is reasonably and naturally calculated to cause such persons to hesitate and refuse to enter the service, then that service has been obstructed and impeded to that extent quite as effectively as though the possible recruit had been retarded or prevented from enlisting by the exercise of physical force. The mind is an important factor in the making of a soldier; nor are we confined to the mental attitude of the eligible recruit himself. It is well known that the feelings and views of parents and those nearest and dearest are powerfully influential upon the man himself, and anything which tends to create distrust, indifference, or even hostility, among the masses of the people will be reflected in the temper and spirit of those expected to rally to the support of their country.

Your consideration is invited to the effect which the state-

ments contained in this letter would be likely to have, not only upon the community at large, but upon those men eligible for recruiting and enlistment. If you believe that language is calculated to obstruct, delay, retard, embarrass and prevent enlistment in the manner indicated, and that it was intended so to do, that the publication was knowingly and wilfully made for that purpose among others, then it is unnecessary for the government to show that some special person was, in fact, thus lost to the service. Newspapers of wide circulation may be presumed to have that effect upon the minds of some readers, and injury to the service, and consequently to the United States itself, would naturally and logically ensue. Bear in mind, however, that you must find that this publication was knowingly and wilfully made; that it was adapted and reasonably calculated to produce the result charged, and that that, among other things, was the purpose of the defendant in causing it to be made. Upon all counts you must find that the offense, if committed at all, was committed at Kansas City, Missouri, in this judicial district.

Speaking generally now, you are reminded that this prosecution in no wise invades the constitutional right of free speech and free press. The defendant has spoken and has published, but no one is permitted under the constitutional guaranties to commit a wrong or violate law. It was within the power and jurisdiction of Congress to prohibit utterances conceived to be injurious to the public welfare as it did in this Act. So long as that law is in force it must be respected and obeyed, and if the spoken or written word knowingly and wilfully uttered with the attempt to accomplish the unlawful purpose prohibited offends against that law, the offender has no protection in these constitutional guaranties. Responsibility for slander, for instance, with which you are familiar, is an example.

Neither this law nor this prosecution seeks to interfere with the right of opinion nor with a proper advocacy of principles within the limitations of the law. But no valid law, as this is, may be violated under guise and color of advocating principles. Honest criticism made in the interest of the govern-

ment, and intended to favor and forward the policies to which it is committed, and to which all loyal citizens owe adhesion, is no offense; but words and acts hostile to these policies and intended to paralyze and defeat the efforts of government do not come within that category, and if, as here, specifically denounced and prohibited by statute, cannot be permitted.

If it is true that the act complained of was done wilfully, that is, knowingly and intentionally, and with the intent and for the purpose charged, then it is immaterial that it may also be claimed that the object was believed by the defendant to be a good one. If, as under the present statute, a wilful attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States is prohibited, and, nevertheless, in defiance of the law a person does wilfully, that is, knowingly and intentionally, attempt to cause such conditions, even though individually honestly of the opinion and belief that such act is meritorious, justifiable and for the best, such opinion and belief constitute no defense to the violation. In time of war, when the safety of the nation is at stake, many individual activities which in time of peace would be permissible may be, and are, limited or prohibited entirely. It is enough that Congress by lawful enactment forbids them. No motive then justifies intentional disobedience.

The same principles apply equally to the charge of obstructing the recruiting and enlistment service of the United States to the injury of the service and of the United States. If the act is done wilfully and knowingly for the purpose of bringing about that result, then alleged good intentions cut no figure.

I will now read to you some instructions which have been requested, which I read in connection with what otherwise the court has said and will still say, and which you will take as a part of the charge emanating from the court:

“Revolution means literally a revolving around; a fundamental change, and does not necessarily employ the use of force.”

By that I assume is meant armed force. A revolution, unless meekly submitted to, always involves some sort of force—that is to say, at least, compulsion, and revolutions ordinarily, although not always, but ordinarily, involve physical force. Generally military force, and often, and more often than otherwise, bloodshed; but whatever may be the type of revolution mentioned—or in the mind of the defendant here, if such was in her mind, a revolution in the midst of war would be one of the greatest misfortunes that could happen to the country, for the effect upon the war has so demonstrated clearly in the case of Russia. Even though merely what we call a social or industrial revolution, one that temporarily, if not for a considerable period, at least, clogs and disturbs, and practically destroys the operations of production, it must necessarily be suicidal in the case of a nation actually engaged in war with a powerful adversary.

The real issue to be decided by you is strictly within the narrow compass defined by the indictment presented in this case and put in issue by the plea of not guilty entered by the defendant, and in this connection you are instructed that the indictment is no evidence against the defendant, and it would be improper for you to be influenced against the defendant in the slightest degree by the indictment returned against her. The indictment is only a formal statement of the charge preferred against the defendant for the purpose of enabling her to know and meet the offenses alleged against her.

The fact that this country is at war, and that the law under which the indictment in this case was returned was to meet the war situation, does not change the required weight of evidence, or the law relating thereto. In passing upon evidence in this case it is your duty to render a verdict fairly and impartially, free from prejudice, free from bias, and free from any desire on your part to render a verdict one way or the other. You should be guided solely by the evidence that you have heard from the witness stand, and the law.

You are instructed that where an innocent or criminal construction can, under the evidence, be equally inferred from the language charged against the defendant, the innocent in-

terpretation should be adopted by you, as the law presumes the innocence and lawful conduct of the defendant.

And in this connection you are advised that you are to consider in such case, not the language alone, but all the evidence with respect to the language, or the intent and views and mental attitude of the person using the language.

Neither Socialism, the Socialist party, nor any member of the Socialist party is here on trial—as such, that means, of course.

Whether you approve or disapprove the doctrines and teachings of Socialism or of the practice of the Socialist party or its principles is wholly immaterial. Every person has a perfect right to affiliate with or belong to any political party or other legitimate organization of his own opinion and cannot be denied that right; every person has the right, within lawful limits, to advocate the principles or doctrine of the party or organization to which he may belong and cannot be denied that right.

Every person has a right in all lawful ways, and by all lawful means in his power, to aid or assist the party or organization to which he may belong, but no person under the name, guise, or pretense of aiding any organization or party, has a right to commit crime or to violate the law, or to procure and induce others to violate the law, and the court does not here or by anything stated in this charge intend to express or intimate an opinion upon the facts in this case of the guilt or innocence of the defendant. That is exclusively within your province.

You must not allow your passion or prejudice, approval or disapproval of friends or acquaintances, to influence you in the slightest degree, but you treat this defendant with the same consideration with which you would treat any other person who might be brought before you charged with a criminal offense.

Now, gentlemen of the jury, owing to the wide scope which this case has taken in discussion, it becomes necessary for the court to add a few remarks, for the reason that otherwise you would, perhaps, think that by silence the court acquiesced in

some of the statements and arguments made. It is a part of the duty of the court to guard the jury against a misunderstanding of the issues; against the danger of being led away upon false issues, or against the danger of giving undue weight, or perhaps any weight at all, to that which has little or no pertinence to the subject or the offense under discussion.

Reference has been made here to criticism, and the right of criticism, of officers of the government. It has been stated here freely by counsel upon both sides, and by the court, that such right of criticism, within proper limitations, exists. You should draw the distinction, however, between criticism which is made friendly to the government, friendly to the war, friendly to the policies of the government, and intended to forward and perhaps expedite, and such as are made with the intent of hampering it and paralyzing the arm of the government in carrying it out. The court is leaving to you entirely what the purpose was here, but it is proper that you should understand that there is a very vital distinction between the classes of criticism referred to. A man may say, as many have, that the aims of the government, as stated and formulated by the President in his admirable address to Congress, are of the highest nature and to be applauded, that the war should have been entered into, that the war should be carried out, but has expressed the opinion that some of the people who have been selected to do certain subordinate things in connection with it have not been of the highest efficiency, and they have not accomplished as much as they should, and that for the purpose of carrying on the war, and of forwarding it to a successful conclusion, has urged that changes in that respect be made.

Now, gentlemen of the jury, with the intent of the nature that I have stated, such remarks are criticism in a sense, but they are not criticism which comes within the purview of this law.

The point has been made here that the editor of the *Star*, Mr. Stout, was guilty of improper conduct in publishing this letter which was sent to him, after, in his opinion, knowing

or feeling that it was an improper and disloyal letter. Gentlemen of the jury, this letter was sent to the editor of the *Star* with a very urgent request that it be published. With an appeal practically to the chivalry and courtesy of the editor to right what was conceived to be a wrong, by publishing a letter of correction over one's own signature. That was strong reason for its publication. No matter what the editor of the *Star* thought of it, and he says he knew nothing with respect to the legal effect of it, he did this—he immediately sent that letter to the law officers of the government for their examination and investigation and to determine what, if anything, ought to be done with it; and the publication was made, as he says, upon this urgent appeal and upon this, practically an insinuation, that he would probably refuse to publish it, and that if he did refuse to publish it, it would not be a proper courtesy. Now gentlemen, you are to determine whether you think there was anything wrong or unreasonable in that conduct, but in this, as in respect to criticism, no matter if it be found, or if you should think that there were others that had committed some offense or had done some inappropriate thing in this same connection, that, of course, could have no effect upon the guilt or innocence of this defendant in this case, because she is responsible alone for her own acts, and because somebody in some other field or in some other connection may be equally guilty, is no reason why that is a matter that should be urged in her case. That is not saying she is or is not guilty, but it is a matter that indicates to you that that should have no bearing upon this situation whatever, because there is no dispute that the letter was published; the letter was sent there to be published by her; it was desired to be published, she took the steps that usually result in publication, and she, of course, is responsible for the natural and logical effect of her action, that is, that the letter found its way into the press.

You are further instructed that the only part of the publication here which concerns the defendant at all, or which bears upon her guilt or innocence, is the letter itself. She did not ask, demand, nor cause, in the sense of any violation,

on her part, the additional part of that article which was read to you. And the additional part of that article which was read to you has no bearing upon the letter itself with respect to the question of whether its preparation and publication was an offense under this statute. The newspaper published the balance of that article, which in no wise affects the letter itself, but the newspaper alone is responsible for publishing that, and it was not requested by the defendant in this case, nor is she responsible for it, nor can she claim any benefit from it—the balance of that publication. It has already been stated to you in the course of the trial that the book and extracts from the book “The New Freedom” published by President Wilson in 1913 were reprinted in 1918.

Now it may be true, that by reissuing in 1918 the principles announced—the situation in general announced with respect to the trusts of the country, were reiterated and reaffirmed by the President, but gentlemen, that can have no bearing upon the matter of the government’s responsibility for this war, nor the question of the responsibility of the parties by whom the war is being prosecuted. This also is to be understood: Assuming that the President of the United States entertained the views he did there with respect to our industrial relations, views in which he is not alone, because both the Republican and Democratic parties for years have been attempting to correct the industrial conditions there complained of, the difference being as to the methods employed; suppose he did entertain these views, and suppose they were true, nevertheless it was the writer of that book, President Wilson himself, who wrote the message to Congress saying that it was our duty and that it was a necessity, a necessity not on industrial grounds, but a necessity on the ground of the violation of our rights, violation of the cause of humanity, of freedom and of democracy, in many respects, that we should enter the war. The President of the United States, in whom the defendant in this case expressed unbounded confidence, was the man who, knowing all those things, put the United States into war, in so far as it could be done by any official act, being followed up by an acceptance of those views in a resolution on the part

of Congress. All those reaffirmed again in January of this year, with a full knowledge, it must be, of all the conditions existing here in this Nation, that are said in that book to exist.

Now, gentlemen, it is for you to consider whether, that being so, the man that gave utterance to those opinions and those views and those criticisms upon our industrial system, went into this war, said it was right to go into this war, still advocates our rights, still demands that the war should be continued, fought out to a finish, that there should be no peace except by force, which compels surrender and adherence to our institutions and our views, whether he was actuated by, and whether the Government in any sense could be actuated by, either the administration, or the Government as an entity, could be actuated by the sordid principles that are charged.

The President of the United States is the commander-in-chief of the Army and Navy of the United States. In time of war he is almost a dictator. He and his Cabinet run the Government, and Congress has conferred upon him all the powers he has desired. Both branches of Congress, both political parties of those branches, almost without dissenting voice, because the minority is so negligible, have stood behind him and have granted him all the authority he has needed for the prosecution of the war. So the President practically stands alone as the administration, in such a case as this, for the prosecution of the war. His Cabinet,—subordinate officers under him, out in the different departments, they are mere subordinates. Can any one say, because we should find occasionally some one who was engaged in such a position for his own selfish ends, that the administration—the administration, the Government, in the sense of a Government itself, or the administration, is for the profiteers?

Now the President found us in a situation where war was imperative for the protection and safety of this Nation. He took the situation as he found it. He had to have the help of all the resources and industries of the Nation; we were not prepared; we had to prepare on a colossal scale for what we needed to have and do in that conflict. We needed every-

thing that the great industrial powers and forces of the country could produce. Now necessarily that caused an increase in the volume of output of steel and of leather, and of woollens, and of everything else,—they even say that the farmers themselves, because of the increase of food and food prices, are profiteers—some people do—there had to be an increase in output, there was a great demand, there was a shortage, labor had to be secured, labor had to be paid highly and is being paid highly, for industries. All these things, of course, with the great volume of output, produced income and produced profit; a good part of it has already been turned back into the Treasury, and there is now under contemplation, and further, in the way of excess profits tax upon those that have accrued, but nobody is disposed to dispute, gentlemen, who has common sense and knowledge, that great fortunes are made in those things that had to be prepared for war, but that is an incident of the war, that is not a war aim. That is not in any sense a thing for which the administration is responsible, not a thing which affects, one way or the other, the successful prosecution of the war. The point is that we must have the products; we must have them thrown into the industries of the war. The President could not stop, no matter how much he disapproved of any of these things, he could not stop in the face of the enemy and effect domestic reforms. He could not do that then. We don't ordinarily clean house and hang out the bedding when there is a thunderstorm on. We wait until it is over, and take care of things; go dirty a little longer. I assume these things are so, but I say they are mere incidents, however, gentlemen, and they have absolutely nothing to do with the issues in this case. But as I have said, the third count contains the charge that she knowingly made a false statement, and she says that she relied upon these various things and believed them, and therefore believed that what she said was true. Upon that count, of course, that is entitled to be taken into consideration, and if you believe that was so, that would render her not guilty upon the third count, but it would not on that account give her any license whatever to publish anything whatsoever with the intent, if

she had such intent, to commit the offense charged in the first and second counts, whether it was true or not, or what she believed about it, because, as I have said, the good purpose, or any purpose, there is not involved. The only purpose which is involved is the purpose to do the thing prohibited by Congress, and if the defendant had that purpose or that intent, as we call it, then that is sufficient to cause a violation of the Act, if she did the things that constitute the violation of the Act knowingly.

Why, gentlemen, anything, as I say, that would cause us to come to a halt and standstill because there is some defect in our internal machinery—because there are inequalities and inequities in dealings between citizens—anything of that kind that should bring about a practical standstill or revolution like that in Russia, would be of the most serious consequence. It would spell defeat, it would mean German domination, and we know that in the German autocracy, in its success, there can be no possible hope for democratic institutions, nor for this country.

Now, there is another consideration, and that is the fear expressed, or the statement made, that because of these reasons the war was not being prosecuted for democracy. The war is being prosecuted for the protection and in safeguarding all democratic institutions, such as those of America, England, France and Italy. A democracy depends upon what the thing is. The fact that England is under a king who is a mere figurehead does not make England otherwise than a democracy within the definition of that term. President Wilson so considers it and so treats it. France is a democracy, but not exactly the same kind of a democracy as ours, but nevertheless the powers of the Government are derived ultimately from the governed, and that is what a democracy is. Democracy means the people rule. That is the origin of the term; directly or indirectly, as the case may be, but they are the ultimate controllers of the machinery of government. So in England, the Prime Minister occupies a position not altogether different, in many respects, from our President, and all the government there and the powers of government are

derived from Parliament, and Parliament derives them from elections through the people as they do here. So it is a mistake, because a government is a monarchy in form, is a monarchy in name, to think that it is necessarily not a democracy. I say then that it is democratic institutions we are fighting for as against the autocratic and imperial institutions of Germany and her allied associates.

Now, equal distribution of wealth, or any particular distribution of wealth, is no essential element of democracy, gentlemen. The argument has been made here just as though democracy, or whether we were fighting for democracy, depended on how the wealth was to be divided and how our industrial system was to go on after the war. Why, that has nothing to do with it. The only question is, where is the supreme power lodged which decrees what the distribution of wealth shall be; whether it is lodged in the Kaiser, as in Germany, or whether lodged in the Congress and Parliament of free peoples, as in this country, and in Great Britain and in France. That is the whole question. A democracy in determining its affairs may often do very badly for itself; sometimes it does very badly for itself. It makes mistakes. There are evils in it; there always will be until we get to be more perfect people—which, I think, is far removed. But that is not the question. The question is, who has the right to determine those things, and that is the people, in the sense in which I have stated. If the Government is a popular one in its general nature, then we are fighting for democracy when we fight to establish and maintain that sort of a government. It is not a question of how our industrial affairs are managed, or how our wealth is ultimately distributed. That, as I say, is not an essential element of democracy at all.

It has been stated here, and references here made to the fact that the defendant in this case has described herself as an Internationalist. That is, one who is devoted to the peoples of all countries irrespective of the people of any one country, and who owes no exclusive allegiance, or who claims to owe no exclusive allegiance to one country, in the sense that he or she indulges a patriotic regard for it above all

other countries. Well, gentlemen, of course, as has been stated and admitted here, such a conception of citizenship is absolutely inconsistent with, and antagonistic to, any idea of patriotism at all, because patriotism means the adoration and especial regard and love for a single country, which is one's own country. Under such circumstances, of course, there can be no such thing as patriotism as commonly understood. Now no one is on trial here for entertaining any such view, but that has been or has appeared before you in evidence, and the court may say to you that you may take that into consideration in one sense in passing upon the intent and attitude of the defendant in this case. It is proper for you to consider whether one entertaining such views and such beliefs is more, or less, likely to commit the offenses charged against her than one who is not an Internationalist, but a Nationalist.

The slogan that has been referred to, that it was agreed to make the world safe for democracy, for the purpose of enthrusing our boys to go to France in thinking they were fighting for democracy instead of for the material things. Well, gentlemen, I don't know whether that was manufactured or invented for any improper purpose, but up to this time there has never been a denial nor a doubt that that slogan was coined by President Wilson himself. No one has ever attempted to charge that he was guilty of plagiarism in the adoption of that. The question for you is, then, to determine whether that was adopted for honest purposes and for the purpose of characterizing and stamping the nature of the war into which we entered as he described it, or whether the coining of the slogan had an ulterior purpose.

It is necessary for the court on account of some definitions of terms here, to define to you the meaning of the terms unlawfully, wilfully, knowingly, and feloniously. The only word that is used in the statute is "wilfully." Anyone who wilfully does the act charged, commits the offense—provided the other elements are present. Now, "wilfully" means, as this is used, merely this: Intentionally; with a determination to do that thing. "Knowingly" means with knowledge. The term "knowingly" is practically included in the term "wil-

fully" and need not have been used in this indictment because no one can do wilfully—that is, intentionally—that which he does not know and understand. The term "unlawful" means contrary to law. That's all that means. That need not have been used, because, as I say, the term "wilfully" would have been sufficient. It is customary, and has been from time immemorial in indictments, to use the word "feloniously." The word "feloniously" as used in the indictment in a criminal case merely means that the act was done with the intention to commit a felony, or to commit any kind of a crime—the crime charged—which is an intention to commit the crime. There is nothing in any of these words that requires you to find that there was any other kind of malice or moral turpitude involved in the act of the defendant than just the sort of things that I have now described to you as conveyed by the words which have just been used. In other words, it means a deliberate, knowing purpose to do the thing charged; and if the thing charged is an offense, then one who knowingly does it and intentionally does it commits an offense irrespective of any other frame of mind in which he or she may be.

There have been some extraneous matters introduced here in discussion. The court will refer but to one; and that is the reference, in rather a slighting way, to one of our Allies—Great Britain, in her treatment of her colonies. Gentlemen, it is not my purpose to enter into any defense of Great Britain, and the matter would manifestly not be referred to if it had not been used in a sense which might prejudice you against the purposes of the war, for the reason that upon our side is this nation. Great Britain is one of our Allies, France is another, and Italy is another. This is not an opportune time, when we are all locked together in one common council, that anything should be said that impugns one of our Allies; because a blow at any one of our Allies, gentlemen, at this time, anything that creates a hostile impression, anything which leads to lack of co-operation, anything which in any sense and from any source weakens the manpower and fighting power of that Ally, is a blow at ourselves; and to the success of our common venture.

I don't know, we, none of us, know, what these reports in the press may be, to what extent they are true or not true with respect to other nations. We do know this, that in this war there has sprung to the aid of Great Britain the voluntary support of all her colonies, without coercion, without even a garrison that could be called such, to cause it to be done; Canada, Australia, New Zealand, practically free, all sending their volunteers to aid in this common conflict, this common struggle for democracy. South Africa, controlled by those who were originally subjugated, as has been said. The Boers themselves maintained safety in South Africa and drove out the German colonies without coercion. India, left practically alone, necessarily, in this conflict, has suffered no revolt. Gentlemen, these things all speak highly, at least, for the treatment which those colonies have received from the mother country. Ireland. There is a difficulty. We know that there have been long-standing difficulties over principles of government between Great Britain and Ireland. We don't know all the merits of it. We do know the leaders of the Nationalist Party in Ireland, John Redmond, now dead, opposed bitterly the action of the group of Irish Nationalists who sought to bring about and did bring about the first Sinn Fein rebellion. We know that John Dillon, the present leader, as equally and firmly opposes the present action of Sinn Fein rebellion. They are the leaders and the spokesmen of the real Irish party. We do know that thousands and thousands of Irishmen have voluntarily gone into the trenches to fight for this common cause, for democracy. All this illustrates whatever the fact may be, that now, there, no more than here, is it the time to create dissention or to do anything or say anything that will accomplish a partial paralysis of the powers who are now fighting for the freedom of the world; because, gentlemen, democracies must fight. They must fight effectually, and in order to do so they must fight co-operatively. Individualism must be put aside for the moment in this country. We must now stand shoulder to shoulder because if democracy does not so fight, she will go down before the organized forces of autocracy; she cannot protect herself, and her destruction is in-

evitable; and that is true whatever may be her opinion about different things, that may be settled here in times of peace and within our own domestic borders.

Now, the hand of that sort of criticism, and the tongue of that sort of criticism must be stayed until peace is restored and we can work these things out together, as we have always worked out problems here at home.

The defendant in this case comes before you presumed to be innocent, and this presumption attends her throughout the trial, including your own deliberations, and remains until, in your opinion, the Government, upon whom the burden rests, has removed it by evidence which convinces you beyond a reasonable doubt that she is guilty. By reasonable doubt is meant just what the term implies. It is a doubt founded on reason and substance which arises from the evidence, or want of evidence, in the case. It is not a mere captious or capricious or whimsical doubt, not a mere supposition or possibility arising from hesitation to convict of crime, but it is a doubt such as if you were to meet with it in deciding the important affairs of your every-day life would cause you to hesitate and act upon it. If you have such a doubt of the defendant's guilt upon any of the counts you should give her the benefit of that doubt and acquit her upon such count. If you have no such doubt you should say so by your verdict. You, gentlemen of the jury, have been selected from the body of this division of the district because you embody at least the average intelligence, moral sense and patriotism of the communities in which you live. You take into the jury room with you that same every-day common sense which you apply to the determination of the important affairs of our every-day life. You reach your conclusions and convictions here in the same manner. I repeat that you are the sole judges of the evidence, the weight of the evidence, and the credibility of the witnesses. You and you alone determine the facts.

Mr. Stedman. I wish to except to the first statement where the court characterizes the letter as a demand for its publication, and that argumentative portion of the charge which follows it; also, to that portion where the court says that the remarks of the defendant

discredited the laws of this country applicable to the system of private property and to that portion which states that the theory of the defendant was that property should be divided up, or that that of large or small should be divided.

I except to the charge in reference to the Bolshevik movement in Russia, on the ground that the evidence spoke only of its ideals, and no evidence has been introduced as to the real history of the Bolshevik movement.

Facts which have appeared in official documents show that Krensky, after he organized his army, made a charge for the Allies when they had no guns or munitions, and they walked forward without arms and were shot down to the tune of almost six thousand. The Bolshevik movement tried to keep its army and failed—

The COURT. That is not proper exception. Just save your exceptions without argument.

Mr. Stedman. I except to the arguments and the theory against property and citizenship and to the court stating that the defendant purported to say we entered into this war solely for the profiteers.

The COURT. The court undertakes to do nothing more than to state its understanding of the testimony given and has already stated to the jury that they are the sole judges of that, and will determine that fact for themselves.

Mr. Stedman. I except to the definition of the court as to what constitutes military service as distinguished from military forces, or the reverse; to the statement that anything which may be done to reduce the morale, or reduce the spirit of the military forces constitutes a violation of this Act; to the conclusion that the doctrine following the statement of the defense as to the Bolshevik movement—that is, or its government—and that reference to it was to traduce a system of property ownership; to the portion of the charge which defines the word “wilfully” as synonymous with “intention”; to portion of the charge where the court assumes that the evidence was that the defendant stated that we were fighting for Morgan’s millions; to where the court said in what purported to be a quotation of the evidence, that the defendant was fighting for the movement—for the Bolshevik movement—was one of an ideal condition; to that portion where the court says, “We all know that this revolution in Russia disintegrated its army and resulted in the betrayal of the Allies’ purpose”; that there is no evidence in this record to that effect.

I except to that portion of the charge which goes to the question of intent, where the court said that a belief, an honest belief, and a meritorious belief, is no defense; to the court’s charge that revolutions are accompanied by armed force, on the ground that there is no evidence or such statement in this record, revolution in industrial systems which is followed by revolution in government, they are not accompanied by physical violence.

The COURT. I think I gave it in the alternative to the jury; sometimes it is and sometimes it is not.

Mr. Stedman. I object to the charge in speaking of Mr. Stout's testimony that he may be equally guilty, and that would be no defense. I except to the charge which assumes that the Government is distinguishable from the administration as an absolute fact, and that the Republicans and Democrats are supporting the President as an administration and to the charge where the court characterizes farmers as profiteers.

The COURT. I did not characterize them as such. I said that some people spoke of them in that way.

Mr. Stedman. Very well. I don't want to have the defendant put in that position, because she specifically refuted it. The characterization of the excessive profits tax on profiteers I except to.

The COURT. Why?

Mr. Stedman. Your Honor's statement that we are meeting the problem by placing an excessive war tax on the profiteers as an answer to the defendant's position in regard to the profiteers. And I except to it as a reply to statement of counsel in which attention was called to the fact that the tax was exceedingly light in proportion to those of other countries. I except to the statement that Italy is a democratic country, either by election of its King or otherwise—

The COURT. The court has expressed no opinion, if you recall, as to Italy, except that I included it in that category because the President has always included all these Allies in that category, but I didn't say anything myself, personally, with respect to the government of Italy, because I am not so familiar with it.

Mr. Stedman. I except to the characterization of England as a democratic country, first, because the House of Lords is appointed, that they have equal suffrage, and there England has more votes in the House of Parliament and House of Commons both, upon a larger percentage, than Scotland, Ireland and Wales all combined, and that no other colony has any representation there.

I except to the statement in regard to the historical conditions in India, because when those troops were brought in they replaced them with British troops to prevent any possible uprising.

The COURT. There is nothing you said about India or any of the British colonies that was in evidence. That is why I had to reply to it.

Mr. Stedman. I except to the reference of the publication of this by the newspaper on the basis that it was done through chivalrous motives.

The COURT. I didn't say he did it from a chivalrous motive. I say it was practically invoked through the motives of chivalry and courtesy.

Mr. Stedman. I except to the statement in regard to the equal distribution of wealth as not being democratic, on the ground that the theory was neither advanced by the witness, by the defendant, nor by counsel, nor by any other theory that I grasped in this case.

I except to the statement that all power is lodged in the Kaiser.

The defensive war can be declared without consent. Otherwise his actual power in Parliament is much less than our own President.

The COURT. The court did not intend to define exactly any power of the Kaiser; it simply referred to the greater power of such autocratic governments and used him as an example.

Mr. Stedman. I except to the statement that malice is not sufficient and that intent and wilfulness are substantially synonymous. And, to the charge where the court censures a criticism of our Allies; their policies and to that portion in regard to Ireland on the ground there is no evidence of it, and there is no evidence in this record as to the present position by Mr. Dillon.

The COURT. The same sort of evidence with which you characterized the whole Irish situation.

Mr. Stedman. I object to the court meeting that. The counsel should meet that, because I cannot reply to your Honor in your position, on the same authority; because we are not standing equal. Counsel cannot. My facts may be all right, but the position counts.

I take exception to the proposition that individualism must be put aside.

Mr. Stedman requested a number of written instructions that he presented, some of which were given and some refused by the Court, and also excepted to portions of the charge to the jury.

The Jury retired to consider their verdict.

May 23.

THE VERDICT AND SENTENCE.

At 7.30 p. m., the Jury returned.

The COURT. Foreman have you decided upon your verdict in this case?

Mr. Caton. Your Honor, we have. Guilty as charged in the three counts of the indictment.

The jurors were then polled.^a

^a The jury took just three hours to arrive at a verdict. As the words guilty as charged were pronounced, Mrs. Stokes leaned towards her husband and with a slight smile whispered to him. He gave no sign. Mrs. Stedman who sat at her right quietly grasped her hand. Mr. and Mrs. Stokes remained in the Court room surrounded by friends while the judge was granting until June 1 for hearing the motion for a new trial and continuing the prisoners bail bond for \$10,000 which had been fixed at that amount on her arrest. As they left the court room she patted her husband's shoulder, saying affectionately, "cheer up". A friend grasped her hand. Then she grasped the hand of a friend and said, "Why so gloomy. The fight has just begun. We have to pay the price if we try to help". Her husband had walked a few steps ahead. "There is compensation in everything," he said, gravely. "Mine is that I think more of her than I ever did in my life. And I have to walk in a parade in New York City on Saturday with my regiment." Mr. Stokes is a member of the Ninth New York Coast Guards.—*Kansas City Times*, May 24, 1918.

June 1.

A motion for a new trial and in arrest of judgment were overruled by the Court.

Mr. Wilson. I move that we proceed to the sentence.

Mr. Stedman. I understand Mrs. Stokes wishes to make a statement.

The Court. Very well.

Mrs. Stokes. The communication which I sent to the *Star* announced that I was not supporting unqualifiedly the war aims of the Government. I assumed, among the numerous aims which had been presented by different groups of people, that it was my privilege to approve or criticise any of the war aims brought forward.

I have at all times recognized the cause of our entrance into the war and I have at no time opposed the war. And although my home was searched in my absence, and although witnesses from various meetings I addressed have testified for the Government, no evidence has been produced to prove that I have at any time opposed the war.

Early this year, the newspapers were filled with reports of the exceptionally large profits secured by what is generally known as "war profiteers" and, rightly or wrongly, I honestly feared their dominating influence over the administration, and I am not free from that apprehension at the present time. I said in this communication that the Government could not be for the profiteers and for the people at the same time and the Government was for the profiteers while I was for the people. "The Government" of course here was used in the sense of administration or perhaps I should say of the largest group of persons administering the Government's affairs—a not uncommon use of the term either in America or in Great Britain.

If I have offended in expressing a criticism which intimates that the Government is leaning to one class or another, it is because I have taken the provisions of the Constitution concerning liberty of expression too literally—language plain and simple and made a part of the Constitution by an amendment thereto by those who recognized its importance during periods not alone of peace but also of stress.

In my trial, messages from President Wilson were read; and witnesses for the Government testified that I emphasized my belief in his sincerity and in the breadth of his vision, but notwithstanding my support of him, I think I have the right to criticise if to my mind there is cause for criticism.

My immediate family are engaged actively in the military service of the country, and in this I have encouraged them. Any suggestion that I would seek to destroy or weaken the morale of the forces with which their own destinies are bound up, would be preposterous. I do not believe that your Honor or the jury would believe me guilty of making a statement with the purpose of creating disloyalty or mutiny in the service in which my family is engaged.

My purpose in writing the letter of correction to the *Star* is, I understand, not challenged; and the jury were instructed that a good motive would not justify an acquittal of me. As I understand it, it was purely a question of intent: Did the statement to the *Star* have a tendency of chilling the ardor and reducing the morale of the troops or of those who might enlist? No record was produced showing a reduction of enlistments, or of the morale of the troops, following the publication of my letter.

I believe your Honor must know (although you disagree with my social philosophy) that I have signally striven to be useful to my fellowmen and to be of service to society. That, although loving the peoples of all countries, I have devoted my life in loving service to the people of my own country. Indeed, it must be patent to your Honor, that the very ideal of internationalism—which this Court regarded as so reprehensible, the ideal of world-democracy—which I hold in common with all my comrades, is one which must make a better citizen of any man in any country he may choose, or accidentally inherit, as his own. I am not conscious of committing any crime, your Honor, unless an ardent desire to serve the ends of social and economic justice, acclaimed as of the highest social value in times of peace, becomes an anti-social thing and a crime in time of war.

There are many things I have it in my heart to say; but somehow I feel that time and events will speak more eloquently for me than I am able to speak for myself. I am ready for my sentence.

Judge VAN VALKENBURG. Of course, this is a question which the Court has given a great deal of consideration. We have arrived now at what to my mind is always the difficult part, and the word disagreeable is too weak a word to use to characterize what the Court is compelled to do under conditions of this kind. I have not left out of mind all of the considerations to which the defendant has called my attention in her last address. I do not feel that with respect to such considerations which would be entertained in matters of a different nature under different statutes and different circumstances, can be permitted to govern the action of the Court in a case like this. The case has been passed upon by a jury; there has been a finding of guilty on all three counts. If the Court has erred, it has been a matter of straightforward announcement in its rulings upon the record, and they stand forth for the cognizance of any court of review. The defendant is accorded an appeal if error has been committed. This Court must exercise its own individual judgment, and

must refrain from shifting the responsibility either to an Appellate Court or to the Executive, with both of whom are lodged large responsibilities and large powers.

I believe this is part of a systematic program to create discontent with the war, disagreement with the causes and justice of the war, loss of confidence in the good faith and sincerity underlying the conduct of the war and its ultimate aims; thereby to cause withdrawal of support at home, and relaxation of effort and effectiveness in the field. All this to the end that a peace on any terms may be brought about with Germany, and the interests of the nation at large sacrificed for the realization of the social and economic views of certain groups. Co-operation for this common object among various irresponsible or visionary elements in the country is perceptible. Some are undoubtedly inspired from German sources; others may not be, but the result, should they succeed, would be the same. Revolution, if deemed necessary, is aimed at, expected and practically invited. The lamentable situation already brought about in Russia is the substantial objective here. True, such a result is not to be anticipated. Of course, we know that existing conditions here, racial and otherwise, are widely different. Nevertheless, we must not encourage harmful activities by passive indulgence, however remote their consequences may now appear.

We have in this class of cases a stubborn and determined resistance to governmental decrees. In a democracy this amounts to defiance of the popular will. To justify the stand taken, logic, reason, and human sympathy are speciously invoked, but no standards of such are recognized except those of the objectors themselves. Such opposition amounts to fanaticism and continues after debate has been closed by final action on the part of the constitutional authorities. Under such circumstances the only practical remedy is a stern and substantial application of legal sanctions.

Therefore, Congress enacted this law, and the President approved it. It was designed to meet a war danger. Its comparative importance in the mind of Congress is made manifest by the penalty provided—nearly, if not quite, double that

for any other offense defined, except murder, treason, and analogous crimes.

The penalty to be inflicted is entirely impersonal in its aspect. It must be commensurate with the gravity of the offense committed, and the danger to be averted. This is not a local affection which is confined to a single number or function, but it is an organic disease which involves the whole body politic and threatens the health and very life of the entire nation. It must be dealt with accordingly, and so Congress has ordained. It is the duty of the Court, laying aside all personal considerations, to carry out and effectuate the spirit as well as the letter of the law. Therefore, sentence must be imposed, not harshly and cruelly, but firmly and adequately.

The statute in this case provides for a fine not to exceed \$10,000, or imprisonment not to exceed twenty years, or both, in the discretion of the Court. That would permit on these three counts a fine aggregating \$30,000 and imprisonment aggregating sixty years. Of course it goes without saying that the Court does not contemplate any such sentence as that, nor does it contemplate anything like the maximum on any one count. This is not a case for a fine. A fine would have absolutely no effectiveness in this class of cases. Besides the Government does not want to enrich itself by these processes. It simply desires to enforce obedience. There will be no fine imposed in this case. The judgment of the Court is that the defendant is guilty as charged upon all three counts of the indictment; that she shall pay the costs of the prosecution, and that she shall be imprisoned upon the first count of the indictment for a period of ten years at the Missouri State Penitentiary; for a like period upon the second count, to run concurrently with the first count, and for a like period upon the third count, to run concurrently with the first and second counts.

An appeal was taken and two years later, a new trial was ordered by the Court of Appeals, on the ground of error in the instructions to the jury (264 Fed. Rep. 18).

The same Court shortly before this, reversed the conviction of Fontana (12 Am. St. Tr. 897).

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